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Authoritarian Constitutionalism

Mark Tushnet¹

I. Introduction

Within days of the Singapore parliamentary election in May 2011, Lee Kuan Yew and Goh Chok Tong announced that they had decided to leave the nation's Cabinet, where they had been serving as "Minister Mentor" and "Senior Minister," positions created for them as former Prime Ministers.² The reason was that the People's Action Party (PAP), which Lee Kuan Yew had founded with others in the 1950s and which had governed the nation since its separation

¹ William Nelson Cromwell Professor of Law, Harvard Law School. I thank William Alford, Rosalind Dixon, Vicki Jackson, Jack Lee, H.K.M. Ewing-Chow, Rahul Sagar, Li-Ann Thio, Arun Kumar Thiruvengadam, and Po Jen Yap for comments on a draft, and participants at workshops at the University of Georgia Law School, Cornell Law School, New York University Law School, and Rutgers-Camden Law School for their comments. Geoffrey Curfman, now Research Intern in the Middle East Program at the Center for Strategic and International Studies, and Al-Amyn Sumar provided important research assistance at an earlier stage of the project, as did --- at later stages.

² See Shamim Adam, "Lee Kuan Yew Ends Five-Decade Role in Singapore Cabinet After Poll Setback," May 15, 2011, available at <http://www.bloomberg.com/news/2011-05-15/singapore-ruling-party-seeks-to-renew-image-with-lee-kuan-yew-resignation.html>. See note --- below (on the creation of the post of "Minister Mentor"). Goh Chok Tong was the nation's second Prime Minister.

from Malaysia in 1965,³ had suffered a huge electoral defeat, while other members of the PAP said that the party would have to “change the way it governs” and engage in some “soul-searching.”⁴

The defeat? The PAP won just over 60% over the votes, and 81 out of the 87 seats in Parliament filled by election.⁵ Anywhere else achieving those results in a reasonably free and fair election, as Singapore’s was,⁶ would be described as a landslide, not a defeat. The PAP’s domination of Singapore politics and policy-making for nearly a half-century, through reasonably free and fair elections in a society without gross examples of violent repression of opposition, may be unique. In this Article I use Singapore’s experience to explore the possibility that it exemplifies an as-yet underexamined form of constitutionalism, which I label “authoritarian constitutionalism.”⁷

³ The PAP had been the dominant party in Singapore since it became fully self-governing in 1959. In 1963 Singapore joined with other Southeast Asian entities to form the Federation of Malaysia, which expelled Singapore from the Federation in 1965.

⁴ *Quoted in Adam, supra note ---.*

⁵ For discussion of the ways in which additional seats are filled by appointment, see text accompanying notes --- *infra*.

⁶ Obviously, any electoral system that translates 60% of the vote into 93% of the seats is highly gerrymandered. For a discussion of Singapore’s electoral arrangements, see --- below.

⁷ Examples of authoritarianism are ready at hand, those of authoritarian constitutionalism harder to come by. Candidates include Malaysia, Mexico before 2000, and Egypt under Mubarak.

Legal scholars and political theorists interested in constitutionalism as a normative concept tend to dichotomize the subject. There is liberal constitutionalism of the sort familiar in

Somewhat weaker candidates, because their authoritarianism was stronger, are Taiwan between roughly 1955 and the late 1980s and South Korea for most of the period between 1948 and 1987.

Consider this description of Mexico, written in 1991: “Mexico has had a pragmatic and moderate authoritarian regime ...; an inclusionary system, given to co-optation and incorporation rather than exclusion or annihilation; an institutional system, not a personalistic instrument; and a *civilian* leadership, not a military government.” Smith, “Mexico Since 1946,” in 7 CAMBRIDGE HISTORY OF LATIN AMERICA 83, 93 (1990). The difficulty with using the latter two nations as examples of authoritarian constitutionalism is that the termination of authoritarian rule casts a shadow backwards over our understanding of its operation during its long period of stability. See also text accompanying notes --- below (discussing the literature on the role of constitutional courts when elites believe that the termination of authoritarian rule is likely to occur relatively soon). Note, though, that the Mexican system lasted for more than a half century, as has the Singaporean one. That seems to me long enough to place the systems in a category worth studying. The French Fourth Republic lasted just over a dozen years. (That Singapore may be *sui generis* is suggested by the fact that Lee Kuan Yew remains the dominant figure in Singapore politics; the regime has not yet had to face a serious question of leadership succession, although the PAP’s leaders have been grappling with the issue of second- and third-generation leadership for decades. For a summary of efforts to develop a successor generation of leaders, see MICHAEL D. BARR & ZLATKO SKRBIS. CONSTRUCTING SINGAPORE: ELITISM, ETHNICITY AND THE NATION-BUILDING PROJECT 66-67 (2008).)

the modern West, with core commitments to human rights and self-governance implemented by means of varying institutional devices, and there is authoritarianism, rejecting human rights entirely and governed by unconstrained power-holders. Charles McIlwain's often-quoted words exemplify the dichotomization: "[C]onstitutionalism has one essential quality; it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law," and "[a]ll constitutional government is by definition limited government."⁸

This Article explores the possibility, perhaps implicit in a restrained understanding of McIlwain's formulation, of forms of constitutionalism other than liberal constitutionalism.⁹ The Article focuses on what I call authoritarian constitutionalism.¹⁰ That discussion is connected to

⁸ CHARLES MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 20, 21 (1947).

⁹ Cf. James D. Fearon & David D. Laitin, *Explaining Interethnic Cooperation*, 90 AM. POL. SCI. REV. 715, 717 (1996) (suggesting that political scientists have more robust accounts of "occasional outbreaks of ethnic violence" than of "the much more common outcome of ethnic tensions that do not lead to sustained intergroup violence.") Similarly, constitutional scholars have well-developed substantive and descriptive theories of liberal constitutionalism and authoritarianism, but only sketches of such theories of intermediate cases such as authoritarian constitutionalism.

¹⁰ For other recent uses of the term, see Alexander Somek, "Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and Its Legacy," in *DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS* 362, 363 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003) (characterizing

recent literature in political science on hybrid regimes.¹¹ Drawing on these literatures, this Article outlines some characteristics of authoritarian constitutionalism understood normatively.¹²

authoritarian constitutionalism as “accept[ing] structures of governance that contain most of the features of constitutional democracy with the noteworthy exception of (parliamentary) democracy itself”); Turkuler Isiksel, *Between Text and Context: Turkey’s Traditiona of Authoritarian Constitutionalism*, --- INT’L J. CONST’L L. ---, --- [manuscript at 9] (2013) (defining authoritarian constitutionalism as “tak[ing] the form of meticulous adherence to a constitution whose terms directly and unequivocally subordinate the liberties of citizens to an oppressive conception of public order and security.”). As will become clear, my definition is different from these.

¹¹ These have been given various names: electoral authoritarianism (ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION (Andreas Schedler, ed., 2006)); competitive authoritarianism (STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010)); and semi-authoritarianism (Martha Brill Olcott & Marina Ottoway, “Challenge of Semi-Authoritarianism,” Carnegie Paper No. 7, Oct. 1999, available at <http://www.policyarchive.org/handle/10207/bitstreams/6578.pdf>). The literature in political science is more concerned with the conditions for the emergence and stability of hybrid regimes than with normative issues, but some parts of the literature shed light on normative issues, as does the related literature on the functions of constitutions and courts in truly authoritarian regimes. For a discussion of the latter, see text accompanying notes --- *infra*. The political science literature developed in part because political scientists found that describing the

The reason for such an exploration parallels that for the analysis of hybrid regimes. For a period those regimes were described as transitional, on the assumption that they were an intermediate point on a trajectory from authoritarianism to liberal democracy.¹³ Scholars have come to understand that we are better off seeing these regimes as a distinct type (or as several distinct types), as stable as many democracies. In short, they have pluralized the category of

intermediate regime-forms as transitional from authoritarian to liberal democracy seemed empirically inaccurate. For such an observation about Singapore, see FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 86 (2003) (describing Singapore's regime as "an ... exception to the rule [of transition to liberal democracy] and one that will not last.").

¹² This paper is an exploration of a conceptual possibility that has some connection to empirical reality, but I do not claim that any existing system fits my concept of "authoritarian constitutionalism" precisely. For similar explorations, see Baogang He & Mark E. Warren, *Authoritarian Deliberation: The Deliberative Turn in Chinese Political Development*, 9 *PERSPECTIVES ON POLITICS* 269 (2011); JOHN RAWLS, *THE LAW OF PEOPLES* (1999) (discussing the conceptual possibility of a "decent hierarchical society").

¹³ See Levitsky & Way, *supra* note ---, at 3-4 (referring to a "democratizing bias" and the "assumption that hybrid regimes are ... moving in a democratic direction" in the relevant literature).

regime types.¹⁴ Similarly, I suggest, pluralizing the category of constitutionalism will enhance understanding by allowing us to draw distinctions between regimes that should be normatively distinguished. Consider one “list of ... electoral authoritarian regimes (as of 2006) ...[:]
 Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, and Tajikistan; ... Algeria, Egypt, Tunisia, and Yemen; ... Burkina Faso, Cameroon, Chad, Ethiopia, Gabon, Gambia, Guinea, Mauritania, Tanzania, Togo, and Zambia; ... Cambodia, Malaysia, and Singapore.”¹⁵ Whatever the utility for political scientists of treating these nations as a single group, for a normative constitutionalist there are obvious distinctions to be drawn: From a constitutionalist’s point of view, even as of 2006 Russia was different from Singapore and Malaysia, and China different from Singapore. Describing a category of authoritarian constitutionalism – and, more generally, pluralizing our understanding of constitutionalism – may contribute to analytic clarity in law as it did in political science.¹⁶

¹⁴ For a description of the need to pluralize specific to Singapore and Malaysia, see Diane K. Mauzy, *The Challenge to Democracy: Singapore’s and Malaysia’s Resilient Hybrid Regimes*, 2 TAIWAN J. DEMOCRACY 47, 51-52 (2006).

¹⁵ Andreas Schedler, “The Logic of Electoral Authoritarianism,” in Schedler, *supra* note ---, at 3. See also JENNIFER GANDHI, POLITICAL INSTITUTIONS UNDER DICTATORSHIP 14-15 (2008) (including China and Singapore as dictatorships).

¹⁶ Some hints of pluralization crop up in discussions of “shortfalls” from full constitutionalism in basically constitutionalist nations and of the distinction between constitutions that are “shams” and those that, while not fully realized in practice, are “aspirational.” See, e.g., David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 880 (2013) (observing that “[it] can be

I begin here with a brief description of three forms of constitutionalism other than liberal constitutionalism.¹⁷ In absolutist constitutionalism, a single decision-maker motivated by an interest in the nation's well-being consults widely and protects civil liberties generally, but in the end decides on a course of action in the decision-maker's sole discretion, unchecked by any other institutions. In mere rule-of-law constitutionalism, the decision-maker conforms with some general procedural requirements and implements decisions through, among other things, independent courts, but is not constrained by any substantive rules regarding, for example, civil liberties. Finally, in authoritarian constitutionalism liberal freedoms are protected at an intermediate level and elections are reasonably free and fair.

The Table below summarizes the preceding discussion and indicates why authoritarian constitutionalism might be distinctive. The Article proceeds by describing in Part II Singapore's constitutionalism, to motivate the later consideration of a more generalized account of authoritarian constitutionalism. Beginning the effort to pluralize the idea of constitutionalism, Part III examines the role of constitutions and courts in absolutist nations and in nations with mere rule-of-law constitutionalism. Part IV is deflationary, arguing against some political scientists' instrumental or strategic accounts of constitutions, courts, and elections in nations with fully authoritarian systems, where liberal freedoms are not generally respected. The Part implicitly suggests that whatever semblance of true constitutionalism there is in such nations results from normative commitments by authoritarian rulers. Part V lays out some general

difficult ... to distinguish empirically between aspirational constitutions ... and sham constitutions....").

¹⁷ The descriptions are elaborated in somewhat more detail in the succeeding Parts of the Article.

characteristics of authoritarian constitutionalism, again with the goal of suggesting that authoritarian constitutionalism may best be defined by attributing moderately strong normative commitments to constitutionalism – not strategic calculations – to those controlling these nations. The upshot of Parts III through V is that either (a) the commitment to constitutionalism in all authoritarian regimes is a sham, or (b) at least some of them – the ones I label “authoritarian constitutionalist” – might have a normative commitment to constitutionalism. Part VI concludes with the suggestion that authoritarian constitutionalism has some normative attractions, at least in nations where the alternative of authoritarianism is more likely than that of liberal democracy.

			Level of force and fraud in elections (or no elections)		
		Low	Intermediate	High	No elections
	Low	Illiberal democracy or mere rule of law constitutionalism	Semiauthoritarianism	Authoritarianism	Authoritarianism
Liberal freedoms	Intermediate	Authoritarian constitutionalism	[? Authoritarian constitutionalism]		Mere rule of law constitutionalism
	High	Liberal democracy			Idealized absolutist monarchy

II. Constitutionalism (?) in Singapore

Understanding the nature of Singapore's authoritarian constitutionalism can provide the foundation for understanding authoritarian constitutionalism more generally. In this Part I offer an overview of some important features of Singapore's legal system and their effects. The topics range from surveillance of private life to electoral manipulation. In each area, I argue, Singapore's legal system is clearly not that of a liberal democracy, but neither is it fully authoritarian. At the least, there are interstices tolerated by the regime in which standard liberal freedoms, including freedom to dissent from existing policy, can be found. Cumulatively, I

believe, these features show that Singapore's regime appears to adhere to some version of normative constitutionalism.

A. A Brief Account of Singapore's Constitutional History

Singapore was a British colony from the nineteenth century through the mid-twentieth.¹⁸ After a brutal occupation by Japanese armed forces during World War II and in conjunction with worldwide trends of decolonization, Singapore gained increasing internal self-government through the 1950s. Full self-government arrived in 1963, when, led by Lee Kuan Yew and the PAP, Singapore signed an agreement with Malaya and several formerly British territories in Borneo to create the federation of Malaysia. Ethnic tensions strained the federation almost immediately, with Singapore's Chinese population believing that the federation's policies unfairly favored people of Malay origin, and Malays in Singapore outraged at PAP policies. These tensions were exacerbated by Indonesian military activity, and led to ethnic riots in Singapore. Malaysia expelled Singapore from the federation in 1965,¹⁹ and Singapore became an independent nation.

¹⁸ This summary draws upon A HISTORY OF SINGAPORE (Ernest C.T. Chew & Edwin Lee eds., 1991), especially Yeo Kim Wah & Albert Lau, "From Colonialism to Independence, 1945-1965," in *id.*, at 117.

¹⁹ Lee Kuan Yew called the expulsion "a moment of anguish," contradicting his lifelong hope for merger with Malaya. See EDWIN LEE, SINGAPORE: THE UNEXPECTED NATION 598 (2008) (quoting Lee Kuan Yew).

With this as background, I now provide a description of some key aspects of the general system of civil liberties and elections in Singapore over the last half century.

B. Chewing Gum and Caning

Mention Singapore to a reasonably informed audience and some of the first things one hears deal with chewing gum and caning. Chewing gum, it is said, is banned in Singapore, and caning symbolizes the regime's harsh treatment of minor offenses.

As it happens, chewing gum is no longer banned, as a result of the free trade agreement that Singapore has with the United States.²⁰ The caning story is more interesting. Caning attracted attention in the United States when a U.S. citizen was sentenced to be caned for vandalizing several cars as a teenage prank.²¹ Caning as a punishment for vandalism was instituted in 1966, when political protestors threatened to place "Yankee Go Home" posters on

²⁰ The United States insisted that imports of chewing gum be allowed. The compromise position was to make chewing gum available for medicinal uses; I have been unable to determine how readily it is actually available. One local informant conveyed his impression that chewing gum is generally available in pharmacies and supermarkets as long as it contains some ingredients plausibly describable as having medicinal properties.

²¹ See Li-Ann Thio, "Taking Human Rights Seriously? Human Rights Law in Singapore," in *HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA* 158, 163 (Randall Peerenboom et al., eds. 2006) (describing the incident).

the walls of private businesses as part of their activities against the War in Vietnam.²² The punishment remained available for ordinary acts of vandalism.²³

Chewing gum and caning are metaphors that capture a widespread sense that Singapore is a state in which the government intrudes deeply into private life.²⁴ Whether Singapore is more of a “surveillance state” than other modern regimes is, I think, open to question. The regime has conducted overt surveillance of public political protests,²⁵ and the Prime Minister once

²² The background is described in JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 71-72 (2012). According to Rajah, the threat was unsuccessful. *Id.* at 71-72.

²³ It is worth observing that bill-posting on private property without the owner’s consent is generally unlawful in the United States and Great Britain, as the ubiquitous sign in London, “Bill Posters Will Be Prosecuted,” indicates. **Citation.**

²⁴ See Li-Ann Thio, *Lex Rex or Rex Lex?: Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 36 (2002) (referring to “government attempts to influence behaviour in the most intimate affairs,” including “public campaigns to flush toilets”). I note that such campaigns are primarily government speech, though presumably backed up by the possibility of some sort of sanction in egregious cases.

²⁵ On some occasions the protesters have responded to government videotaping of their activities by videotaping the officers conducting the surveillance. See CHERIAN GEORGE, *CONTENTIOUS JOURNALISM AND THE INTERNET: TOWARDS DEMOCRATIC DISCOURSE IN MALAYSIA AND SINGAPORE* 128 (2006) (describing government cameras at public rallies). *Cf.* *Laird v. Tatum*,

responded to a question about how he knew with some precision what had been said at a private meeting of an opposition group, “In the age of the tape recorder, you want to know how I am able to get a transcript of what you said?” (to which the questioner asked, “But how did the tape recorder get into the ... room?”).²⁶ Visitors to Singapore regularly comment on the absence of a visible police presence in the city. “Visible” is the operative word, because there may be large numbers of undercover police agents deployed in the ordinary course. And, perhaps more important, it might be that Singapore’s regulation of life is so pervasive that its residents have fully internalized the norms the regime wishes to advance, which would reduce the need for a visible police presence.

All that said, Singapore seems far from full authoritarianism in the degree to which the regime penetrates ordinary life.

C. Freedom of Expression

(1) *A Survey of Singapore’s Regulation of Expression.*

(a) *The Internal Security Act.* Singapore has an Internal Security Act (ISA) that authorizes detention without trial of those thought to pose a threat to national security.²⁷ It has

408 U.S. 1 (1972) (holding nonjusticiable a challenge to U.S. government surveillance of public demonstrations).

²⁶ RAJAH, *supra* note ---, at 205-06.

²⁷ Internal Security Act, Cap. 143, 1985 Rev. Ed. Sing.

been used in Singapore on three notable occasions.²⁸ Two involved threats that reasonably, though not inevitably, could be regarded as serious enough to justify the invocation of emergency powers.²⁹ The third involved a clear exaggeration by the government of the threat posed by efforts by Roman Catholic social workers inspired by liberation theology to organize Singapore's poor.³⁰ The use of the ISA in response to what government officials called the

²⁸ The ISA has been invoked sporadically in individual cases, but the three incidents described in the text are those regularly dealt with in discussions of constitutionalism in Singapore.

²⁹ One episode occurred before Singapore became independent, but is generally regarded as part of the relevant history of the Internal Security Act's use. In the run-up to the creation of the Federation of Malaysia, security forces detained leaders of a major opposition group, known as Barisan Sosialis, which opposed the merger and was an ally of communist-led insurgent forces operating in Malaya. **Citation.** The ISA's invocation was authorized by the Internal Security Council, which had on it representatives of Singapore, Great Britain, and the Federation of Malaya. CHRIS LYDGATE, *LEE'S LAW: HOW SINGAPORE CRUSHES DISSENT* 40 (2003). In 2001 and 2002 the Internal Security Act was used to detain members of Jemaah Islamiah, a group affiliated with al-Qaeda. For a discussion, see Michael Hor, "Singapore's Anti-Terrorism Laws: Reality and Substance," in VICTOR RAMRAJ ET AL. EDS., *GLOBAL ANTI-TERRORISM LAW AND POLICY* 271, 278-80 (2d ed. 2012).

³⁰ For a description of the events, see Jack Tsen-Ta Lee, *Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore*, 2012 SINGAPORE J. LEGAL STUD. 298, 307-08.

“Marxist Plot” looms large in the current memory of today’s dissidents and those who might join them.³¹

The ISA is the classic sword of Damocles, which is effective in deterring dissent even when it merely hangs suspended over their heads. And, perhaps unlike similar emergency laws in fully constitutionalist legal orders, the fact that the ISA was invoked abusively in 1987 suggests that the thread holding it in suspense might be cut again. Yet, Singapore’s track record of abusive invocations of emergency powers may still be comparable to the track record in those other orders: No more than one abuse in twenty-five or more years is not a terrible record among fully constitutionalist regimes.

(b) *Sedition laws*. Singapore inherited a British-style sedition law authorizing criminal punishment for criticizing government policies,³² on the ground that such criticism might foment discontent with those policies and ultimately produce social disorder through law-breaking. Singaporean authorities chose to use other methods of pursuing their critics, though, and the sedition laws have been largely unused. Over the past decade a handful of sedition charges have been brought, based on the view that strong expressions of disagreement with various religious views poses the kind of threat of social disorder – here, of violent communal conflict – to which

³¹ See Andrew Jacobs, “As Singapore Loosens Its Grip, Residents Lose Fear to Challenge Authority,” *New York Times*, June 18, 2012, p. A-11 (quoting a Singaporean activist, “It cast such a large shadow that people here still feel constrained about speaking up.”).

³² Cap. 233, 1985 Rev. Ed. Sing., §§ 3(1)(e), 4.

classic sedition laws are directed.³³ The expression targeted by these prosecutions might well have been denominated hate speech in jurisdictions with bans on such speech.

(c) *Libel law*.³⁴ Singaporean authorities have not needed to use criminal sedition law against the regime's critics, because individual officials have been able to use individual-level libel laws to obtain substantial monetary damage awards from those critics. Damage liability is particularly effective because of its interaction with Singapore's electoral rules, which make people with undischarged bankruptcies ineligible for public office.³⁵

³³ See Tania Ng Tze Lin, *The Rule of Law in Managing God: Multi-Religiosity in Singapore*, 3 ASIAN J. PUBLIC AFF. 92, 97 (----) (describing the first post-independence sedition prosecution in 2005 brought against "three bloggers [who] made defamatory remarks against the Malay-Muslim community," and another in 2009 against "a Christian couple ... for distributing seditious publications that denigrated the Catholic Church and Islam."). For a vigorous criticism of the latter prosecution as unjustified under the Sedition Act's terms, see Yock Lin Tan, *Sedition and Its New Clothes in Singapore*, 2011 SINGAPORE J. LEGAL STUD. 212. Tan discusses the relationship between the Sedition Act and hate-speech regulations, *id.* at 235-36.

³⁴ For overviews of Singapore libel law, see Lee, *supra* note ---, at 313-18; Cameron Sim, *The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law*, 20 PAC. RIM L. & POL'Y J. 319, 331-45 (2011).

³⁵ Const. Singapore, art. 45(1)(b). Such a disqualification is not uncommon around the world. It rests on the judgment, sensible in the abstract, that an official laboring subject to a continuing obligation to pay his/her creditors might be tempted to use public office for private gain (personal gain in the first instance, but of course with the gain to be transferred to the creditors).

The form of Singapore's libel law is rather traditional, and has not been substantially modified to take concerns about free expression into more account than the classic common law did. With respect to public officials, Singapore's High Court expressly rejected modifications of the sort imposed by *New York Times v. Sullivan* and its analogues in other common law systems.³⁶ Its reasons were traditional ones, with a modest adaptation to what it thought were Singapore's special circumstances: False statements about public officials undermine public confidence in their conduct and thereby impair the government's effectiveness. Specifically, according to the court, Singapore's success, both economically and in stabilizing a multicultural

See Thio, *supra* note ---, at 19-20 (reporting a finding "that between 1971-1993, 'there had been 11 cases of opposition politicians who had been made bankrupt after being sued.'"). *See also* LYDGATE, *supra* note ---, at 260 (providing a descriptive compilation of libel suits brought by government officials).

³⁶ J.B. Jeyaretnam v. Lee Kuan Yew, (1992) 2 SLR 310. The defendant, known in Singapore as JBJ, was until his death in 2008 the leading figure in Singapore's opposition. *See* Seth Mydans, "J.B. Jeyaretnam, Persistent Opposition Figure in Singapore, Is Dead at 82," *New York Times*, Oct. 3, 2008, p. 43. Li-Ann Thio, *Between Apology and Apogee: Autochthony: The "Rule of Law" Beyond the Rules of Law in Singapore*, 2012 SINGAPORE J. LEGAL STUD. 269, 290-92, finds some intimations in relatively recent decisions of the possibility that Singapore's courts will move closer to the position on libel held in other common-law jurisdictions, though not as far as *New York Times v. Sullivan*.

society, rests on stringent policies against corruption, known by all to be vigorously enforced.³⁷

False imputations of corruption are especially damaging in Singapore because “the best people must be attracted to serve the Singaporean leadership without fear of damage to their reputations.”³⁸ And, Singapore’s courts are relatively generous in describing statements about a public official’s conduct as imputing corruption to the official as sufficient to warrant a judgment on the merits of both the interpretation and the determination of the statements’ falsity or accuracy.

The courts’ emphasis on the special harm that false imputations of corruption does in Singapore explains what might be Singaporean libel law’s largest deviation from traditional common law rules: It is appropriate that damage awards be larger when the target of the false statement is a high public official, because the damage to reputation and to Singaporean stability is larger.³⁹ As one judge put it, “The greater the reputation of the person defamed, the greater the

³⁷ For a good summary of this position, see Thio, *supra* note ---, at 276. For a discussion of why I attempt to present reasonably sympathetic accounts of the reasons offered for this and other aspects of Singaporean law, see text accompanying note --- *infra*.

³⁸ Sim, *supra* note ---, at 329.

³⁹ The thought is akin to the traditional idea that “the greater the truth, the greater the libel.” *See, e.g., Bustos v. A&E TV Networks*, 646 F.3d 762, 763 (10th Cir. 2011). The traditional idea, though, referred to the content of the libelous statement, not the statement’s target. Still, the analogy might be sufficient to justify the Singaporean rule as a matter of common law reasoning.

damage award that will be made – on the basis that these persons are vulnerable in so far as they are well known ... and have a wider circle of social and business contacts.”⁴⁰

(d) *Judicial independence*. In 1986 a senior trial judge was transferred to the attorney general’s office after he ruled in Jeyaretnam’s favor in a politically charged case. The action was authorized by law, but was unusual because of the judge’s seniority. Government critics asserted that the transfer was a form of punishment inflicted on a sitting judge, and an indication of the judiciary’s lack of independence from the government.⁴¹ Christopher Lingle, an academic, faced a defamation suit for writing that an unnamed country – clearly Singapore – had “a “compliant judiciary [that was used] to bankrupt opposition politicians....”⁴² A 1990 report by a committee of the New York City Bar Association said that Singapore’s judges were “kept on a very short leash.”⁴³

These incidents and judgments, though not recent, seem to continue to be apt. Singapore’s courts regularly uphold government actions that a more independent judiciary might question, and in the one notable incident of judicial resistance to a government action the underlying legislation was immediately modified and the courts deprived of jurisdiction.⁴⁴ Of

⁴⁰ Lee Kuan Yew v. Vinocur & Others, 3 Sing. L. Rep. 477, 485-86 (1995).

⁴¹ See, e.g., . Frank et al., DECLINE IN THE RULE OF LAW IN SINGAPORE AND MALAYSIA 95-96 (1990); Francis T. Seow, “The Politics of Judicial Institutions in Singapore,” available at <http://www.singapore-window.org/1028judi.htm>. (The cited text was a lecture given in 1997.)

⁴² **citation**

⁴³ Frank et al., note --- *supra*, at 92.

⁴⁴ See TAN --- *infra* for a discussion of the episode.

course, judicial deference to the government is common in nations where one political party dominates the system for an extended period, for obvious structural reasons.⁴⁵ Yet, even among such judiciaries Singapore's seems more deferential than others, for example, in forgoing opportunities for subconstitutional review or rights-protective interpretations of statutes.⁴⁶

(e) *"Out of bounds" markers and the regulation of public space.* Singapore has an extensive system of regulations dealing with uses of public spaces – streets and parks, in the classic formulation – for political purposes. **The Public Order Act of 2009 requires that a permit be obtained for a demonstration by even a single person, and other regulations apply to gatherings of more than a handful of people.**⁴⁷ Permits must be obtained from a relatively large number of authorities. The very number of permits required for a single demonstration deters under-resourced groups from applying. Even more, the grounds for denial are unclear.

⁴⁵ The party's control of the government coupled with even modest mechanisms for making judges accountable to the government – through appointment mechanisms, for example – means that eventually the judiciary will consist entirely of judges who owe their jobs to the dominant party.

⁴⁶ The Japanese Supreme Court is offered as an example of a court in a dominant-party system that is, for that reason, "conservative" in its treatment of government initiatives. Yet, it has engaged in a non-trivial amount of subconstitutional review and rights-protective statutory interpretation. For a discussion, see Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U.L. REV. 1493 (2011).

⁴⁷ **Public Order (Preservation) Act (No. 15 of 2009).**

An incident in 1994 set the terms for discussions of the availability of public space for political purposes. Catherine Lim, a popular novelist, made some mildly critical comments about Singapore's government.⁴⁸ Government officials responded with what Singaporean activists have characterized – and assimilated into their thinking – as an intense attack upon Lim.⁴⁹ The officials mounted a verbal campaign against Lim and criticized her for capitalizing on her celebrity as a novelist to engage in political commentary: “[I]f you are outside the political arena and influence opinion, and if people believe that your policies are right, when we know they are wrong, you are not there to account for the policy.”⁵⁰ The newspaper that had published her

⁴⁸ For details of the incident, see Terence Lee, *The Politics of Civil Society in Singapore*, 26 ASIAN STUDIES REV. 98, 109-10 (2002). The tenor of Lim's statement is captured in this: “Increasingly, the promised ... style of people-orientation is being subsumed under the old style of top-down decisions.” CATHERINE LIM, A WATERSHED ELECTION: SINGAPORE'S GE 2011, at 127-39 (2011) (reprinting her 1993 essay).

⁴⁹ See FRANCIS T. SEOW, THE MEDIA ENTHRALLED: SINGAPORE REVISITED 27-28 (1998) (describing the government's response as “a blistering open letter”). On the assimilation of the threat, see Lenor Lyons, “Internalized Boundaries: AWARE's Place in Singapore's Emerging Civil Society, in PATHS NOT TAKEN: POLITICAL PLURALISM IN POST-WAR SINGAPORE 248, 255 (Michael D. Barr & Carl A. Trocki eds.).

⁵⁰ Prime Minister Goh Chok Tong, quoted in LIM, *supra* note ---, at ---.

column dropped her as a commentator, and she was unable to find another outlet.⁵¹ As government officials put it, Lim had gone out of bounds.

The term “out of bounds” entered Singaporean regulatory discourse. Importantly, while government officials acknowledged that there *were* “out of bounds markers,” they refused to specify before the event where those markers were, although “race” and “religion” do appear to be out of bounds. Protestors engaged in their activities at the peril of later being told that they had strayed out of bounds.⁵²

These techniques obviously restricted political uses of public spaces. Yet, a striking feature of some accounts of the problem with unspecified out of bounds markers is this: Activists recount episodes in which, before the event, they feared that they would be unable to navigate through the regulatory process to obtain permits, and then express surprise that they were in fact able to do so.⁵³ Activists also developed methods of evading the regulatory system. For example,

⁵¹ SEOW, *supra* note ---, at 28. Lim continued to publish novels and political commentary. For a recent work of commentary, see LIM, *supra* note ---.

⁵² Even the clarity of the boundaries with respect to race and religion might be illusory in a polity where many issues are tightly bound up with the politics of race and religion. Consider, for example, criticism of some resource allocation decision made on the nominal basis of geography but with an evident racially disparate impact.

⁵³ See, e.g., GEORGE, *supra* note ---, at 127, 137 (describing a “Save JBJ” rally held after getting permits from the police, the Building and Construction Authority [to hang banners from building], and the Public Health Commission [to sell books and stickers], and asserting that the organizers were as “surprised as anyone when their Save JBJ rally cleared one regulatory hurdle

at one point the government lifted all restrictions on “indoor public talks” by Singaporeans, and did not restrict efforts by non-Singaporeans to promote and discuss books they had written.

Activists responded by convening meetings of “book clubs,” nominally to discuss works written by non-Singaporeans but of course providing the occasion for discussing the authors’ views as well as their books.⁵⁴

The government responded to concerns about the severity of its restrictions on the political uses of public space by adopting what it called an experiment in limited deregulation.⁵⁵ It designated a section of a reasonably centrally located public park as a space in which political speeches could be conducted without prior permission, on the model, it said, of London’s Hyde Park Corner.⁵⁶ The experiment succeeded, at least in the sense that for a while it elicited political activity at the designated space. But, probably consistent with general experience with such venues, the excitement wore off, the use of the space became routine, listeners came to be

after another and actually materialized.”) [RA to recheck source]; Lydgate, *supra* note ---, at 285-87 (describing the process of organizing the “Save JBJ” rally); Alvin Tan, “Theatre and Cultures: Globalizing Strategies,” in *RENAISSANCE SINGAPORE?: ECONOMY, CULTURE, AND POLITICS 188-90* (Kenneth Paul Tan ed. 2007) (describing how theater companies “overc[ame] censorship limitations”).

⁵⁴ See Lynette Chua, *Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC’Y REV. 713, 734 (2012)

⁵⁵ **For the details, see ---.**

⁵⁶ For a critical description of the Speakers’ Corner initiative as “gestural politics,” see Lee, *supra* note ---, at 110-11.

curiosity-seekers rather than political dissidents, and the use diminished, **with a revival in usage after the 2011 elections.**⁵⁷

(f) *Press regulation.* Regulation of the traditional press and media in Singapore takes two forms. Traditional media based outside of Singapore such as the *Asian Wall Street Journal* must obtain permits to circulate within the nation.⁵⁸ Pursuant to a statute authorizing restrictions on distribution of foreign publications that “engag[e] in the domestic politics of Singapore,”⁵⁹ the government threatens to suspend permits or limit circulation when these newspapers publish material that the government believes casts government policy in a false and disparaging light. Sometimes the threats allow limited circulation, but without advertising, which of course makes publication unprofitable. Yet, the most celebrated examples of government threats seem relatively mild. They consist of permit suspension unless the newspaper agrees to publish an

⁵⁷ According to one report, within three months of Speakers’ Corner’s opening, “The novelty ... was fast fading, with few regular speakers and a sparse, uninterested crowd of listeners.” *Quoted in Lee, supra note ---, at 111. But see Jacobs, supra note --- (describing recent uses of public spaces other than Speakers’ Corner).* **RA to get additional citations on Pink Dot demonstrations.**

⁵⁸ For overviews of the regulation of international media, see GARY RODAN, TRANSPARENCY AND AUTHORITARIAN RULE IN SOUTHEAST ASIA 27-34 (2004); SEOW, *supra note ---, at 140-74.*

⁵⁹ *Quoted in SEOW, supra note ---, at 148.*

unedited version of a government response to the statements to which the government takes exception.⁶⁰

The regulation of large, general circulation newspapers in Singapore occurs through indirect government influence over the newspapers' board of directors. Singapore law requires that these newspapers divide their shares into two classes, ordinary shares and management shares. Management shares are weighted at 200 times those of ordinary shares, and are held by directors whose appointment must be approved by the government. According to Cherian George, "Virtually all daily titles ... are published by Singapore Press Holdings," whose management and board "has been headed by former senior officials from government" since the 1980s,⁶¹ including one chief executive officer who had been the head of the internal security

⁶⁰ SEOW, *supra* note ---, at 148-49, describes circulation restrictions placed on *Time* magazine – reducing it from 18,000 to 9,000 to 2,000 copies a week – until the magazine agreed to publish an unedited response.

⁶¹ GEORGE, *supra* note ---, at 48, 49. I think it worth noting that in 2013 George was denied tenure in the School of Communication and Information of Nanyang Technological University, a private university in Singapore. Critics of the decision suggested that the denial occurred because of George's controversial role in commentary on Singaporean politics. See "Singaporean Scholars Raise Concerns About Controversial Tenure Denial," Inside Higher Ed, May 2, 2013, available at <http://www.insidehighered.com/quicktakes/2013/05/02/singaporean-scholars-raise-concerns-about-controversial-tenure-denial>.

department.⁶² What George describes as “opposition party newsletters” do “continue to circulate.”⁶³

Gary Rodan summarizes the regulatory system in these terms: “The emphasis ... is on ensuring that the medium does not facilitate political mobilisation.... This mean[s] restricting political engagement and competition to within a narrow sphere of party politics....”⁶⁴

(g) *Internet regulation*. Some observers attributed the election results of 2011 to the widespread use of social media to communicate discontent with government policies.⁶⁵ The

⁶² GARY RODAN, *TRANSPARENCY AND AUTHORITARIAN RULE IN SOUTHEAST ASIA* 21 (2004).

⁶³ Cherian George, “History Spiked: Hegemony and the Denial of Media Diversity,” in *PATHS NOT TAKEN*, *supra* note ---, 264, 276 (emphasis added). The distribution of books is worth separate mention. According Rodan, *supra* note ---, at 91, as of 2004 controversial books were rarely to be found on the shelves of bookstores, but were available for special order. A local informant states that today, “A number of books on controversial topics can now be purchased quite openly from bookshops. Examples include a recent book by opposition politician Chee Soon Juan and a number of works by some former ‘Marxist Conspiracy’ ISA detainees who have denied they were involved in any plot to overthrow the Government.” *See also* Hor, *supra* note ---, at 276 (observing that such books are “on the shelves” in Singapore).

⁶⁴ RODAN, *supra* note ---, at 107.

⁶⁵ *See, e.g.*, LIM, *supra* note ---, at 5 (listing “the tremendous power of the Internet” among the reasons for the election results); Terence Lee, “Mainstream Media Reporting in the Lead-Up to GE2011,” in *VOTING IN CHANGE: POLITICS OF SINGAPORE’S 2011 GENERAL ELECTION* 131, 132

government had been concerned about the use of the Internet for many years. In one celebrated case it harassed the operator of a website to the point that the site had to close down.⁶⁶ It blocked access to one hundred sites offering pornography “as a symbolic gesture but ... declared that it would not ban any political site.”⁶⁷ But, in general the government took what it called a “light touch” approach to the Internet, focusing on websites that contained sexual content and “material harmful to racial and religious harmony.”⁶⁸ Cherian George lists some categories of websites operating in Singapore as of 2006: opposition parties; sites promoting free speech, “several civil society groups,” including those advocating gay rights, religious and linguistic groups “claiming fair treatment,” and some international groups such as Falun Gong.⁶⁹ The government commissioned a report on new media, delivered in 2008. With respect to “Online political content,” the “overarching intent” behind the Commission’s regulations was “to liberalise existing regulations to encourage active, balanced online political discussion while minimising the adverse effects that such change could bring.”⁷⁰ The Commission specifically recommended that “individuals ...and political parties that provide any programme for the propagation,

(Kvein Y.L. Tan & Terence Lee eds. 2011) (observing that the “new media continued its transition from being marginal and alternative to being mainstream.”)..

⁶⁶ See GEORGE, *supra* note ---, ch. 5 (describing the events involving Sintercom).

⁶⁷ *Id.* at 56.

⁶⁸ *Id.* at 72-73.

⁶⁹ *Id.* at 80-81.

⁷⁰ Advisory Council on the Impact of New Media on Society, “Engaging New Media, Challenging Old Assumptions,” p. 15 (Dec. 2008).

promotion or discussion of political or religious issues relating to Singapore” on websites not be required to register.⁷¹

In 2013, the government adopted a new policy that would require websites that “report regularly on Singapore news and attract at least 50,000 visitors a month” would have to register and pay a substantial fee for a license.⁷² According to reports, the policy would “affect[] 10 Web sites, including Yahoo news”;⁷³ the others were reportedly state-owned.⁷⁴ Whether this is a significant expansion of existing regulations remains to be determined. Much will depend on definitions and enforcement. For example, fifty thousand visitors worldwide is a tiny number, fifty thousand Singaporean ones is not, and “reporting” on news and commenting on Singapore politics might be different activities.

Writing in 2006, Cherian George observed in connection with the new media that “things are getting interesting at the margins,” and that it was “quite possible that intelligent, incremental changes at the center will succeed in preserving the status quo.”⁷⁵ That appears to be the

⁷¹ *Id.*, p. 16. It also recommended that “the symbolic ban on 100 websites should be lifted

While there is merit in symbolism, it becomes counterproductive when parents are given a false sense of security.” *Id.*, p. 22. *See also* Hor, *supra* note ---, at 274 (describing the availability on web-sites of videos that had been banned in Singapore).

⁷² *See* “Singapore Clamps Down on News Web Sites,” New York Times, June 15, 2013.

⁷³ *Ibid.*

⁷⁴ *See* Heather Tan, “Singapore to Require News Websites to be Licensed,” <http://bigstory.ap.org/article/singapore-news-websites-require-licenses>.

⁷⁵ GEORGE, *supra* note ---, at 223, 224.

government's strategy. Whether it will succeed, or whether the government will conclude that stronger regulatory controls are needed, remains to be seen.⁷⁶

(2) *Freedom of Expression Overall: An Assessment.* Singapore is clearly not a civil libertarian paradise of free expression. Yet, that is an inappropriate standard for assessing whether Singapore's regulation of free expression conforms to the perhaps modest requirements of normative constitutionalism as such constitutionalism is instantiated in nations generally regarded as constitutionalist. Each of the regulations Singapore places on freedom expression has its counterpart in such nations, with the possible exception of the Singaporean rule that libel damages escalate when a high official is the target of false statements.⁷⁷ And, it seems that none of the regulations are enforced with a stringency that their terms appear to license. Such a "slice and dice" or disaggregated approach is almost certainly inappropriate as well, perhaps something like a fallacy of decomposition.⁷⁸ The cumulative effect of small regulations might be

⁷⁶ Cherian George, "Internet Politics: Shouting Down the PAP," in *VOTING IN CHANGE*, *supra* note ---, at 145, 149, describes an earlier attempt to regulate web-sites by requiring disclosures and limitations on foreign funding that "caused few problems" because the web-site's operators had already decided to operate on a volunteer basis.

⁷⁷ Even that rule might be defensible in the way Singapore's courts have defended it, at least within the framework of common-law development of libel law.

⁷⁸ *Cf.* ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 9 (2011) (describing "the *fallacy of composition*," which is "to assume that if the components of an aggregate ... have a certain property, the aggregate ... must have the same property." Here the components *lack* a property but the aggregate might have it.

substantial. And, the sword-of-Damocles metaphor, captured in the theory of freedom of expression as the “chilling effect” doctrine, explains why the mere existence of regulations with a theoretically broad reach can have troubling effects on the actual practices of freedom of expression.⁷⁹ So, for example, a Singaporean informant suggested that the out-of-bounds markers have shifted substantially, broadening the domain of permissible dissent. Yet, without clarity from the authorities, potential dissidents will necessarily be concerned that some activity will fall outside the new markers, or that, provoked by the demonstration, the authorities will “shift” the markers in a restrictive direction.⁸⁰

D. Election Rules

Singapore has a one-house legislature. Initially its members were elected from single-member districts. This posed a risk to the PAP: An opposition party might gain enough support in a single district, or in a few, to elect one or more non-PAP members. As PAP leaders presented the problem, though, it was as much a question of social order as of political domination. The possible “swing” constituencies were ethnically distinctive, and, according to

⁷⁹ The Singaporean government’s refusal to specify where “out of bounds markers” are set is a near-perfect example of the mechanism by which the chilling effect occurs. As Justice Brennan put it in an early chilling-effect case, without clarity a person will “steer ... wide[] of the unlawful zone.” *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that the state must bear the burden of proof that an applicant for a tax exemption advocated seditious action).

⁸⁰ I use scare quotes because one effect of the authorities’ failure to identify the OB markers is that no outsider can know before the event where the markers actually are.

the PAP, this raised the possibility of ethnically based parties whose programs would disrupt the social stability that, PAP leaders asserted, had been so painfully achieved. Such parties, of course, would also capitalize on minority resentment at lack of parliamentary representation to become strong enough to offer a real challenge to the PAP's dominance.

After J.B. Jeyaretnam won election from a single-member constituency in 1981, the government responded by changing the rules.⁸¹ It created multi-member constituencies, known as "group representation constituencies," targeting the swing constituencies by including them – but not others – in such constituencies.⁸² Accompanying this change, the government required that the slates for multimember constituencies be ethnically balanced. Parties present lists of candidates for each GRC, and at least one member of the list must be non-Chinese, typically Malay or Indian.⁸³ Voters cast their ballots for party lists, not individual candidates. Again, this design has an obvious good-government rationale, that of ensuring representation of Singapore's

⁸¹ For background on these developments in the Singaporean election system, see Li-Ann Thio, *The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study*, 1993 SINGAPORE J. LEGAL STUD. 80, 96-102.

⁸² In 2011, according to the Singapore Parliament's web-site, there were fifteen multi-member constituencies and twelve single-member constituencies. *See* <http://www.parliament.gov.sg/members-parliament>. "Group Representation Constituency," http://en.wikipedia.org/wiki/Group_Representation_Constituency, provides a good overview of the GRC system.

⁸³ The ethnicity is specified in the regulations governing the specific election.

minorities.⁸⁴ The dominant Chinese population might win every parliamentary seat were all districts to be single-member, and even if minorities dominated in a few districts their representatives would be swamped in the parliament as a whole. The result of creating the GRCs, undoubtedly intended, was that the PAP won the district-wide elections in these constituencies, with a slate that did include minority representation. Even after the 2011 elections, the GRCs produced near-total domination of the PAP in parliament.⁸⁵

The domination was only near-total, though, because of two other innovations in representation. The constitution was amended to require the appointment of a limited number – at present, up to nine – of “non-constituency members” (NCMPs) to parliament.⁸⁶ NCMPs are

⁸⁴ According to Kevin Tan, the GRC system was introduced “with the avowed objective of ensuring the representation of ethnic minorities in parliament.” Kevin Y.L. Tan, “Legal Issues,” in *VOTING IN CHANGE*, *supra* note ---, at 49, 52.

⁸⁵ Li-Ann Thio observes that the GRC system was also introduced for the purpose of recruiting new leadership to the PAP, allowing candidates who might not want to risk losing an election to ride the coattails of a popular politician at the head of the GRC ticket. Li-Ann Thio, “The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Convention,” in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* 7, 36-37 (Li-Ann Thio & Kevin Y.L. Tan eds. 2009).

⁸⁶ The number actually appointed depends on the number of opposition members elected in constituencies. So, for example, because the opposition won six seats in the 2011 elections only three NCMPs were appointed to the Parliament.

“third class parliamentarians.”⁸⁷ They can debate all matters and vote on most legislation, but not on the budget, and their participation in committee work is limited.

The stated rationale for the NCMP system was “to ensure that there will be a minimum number of opposition representatives in Parliament and that views other than the Government's can be expressed in Parliament.”⁸⁸ Under the NCMP system, appointment is based on a formula requiring the appointment of the “best losers” – that is, the largest vote-gatherers in constituencies who nonetheless failed to be elected from a constituency. These are typically though not necessarily the leaders of the main opposition groups. Most have gone along with these appointments, albeit reluctantly.

A second innovation was the creation in 1990 of a limited number – again, up to nine – of “nominated members” (NMPs). As the name indicates, these are people from outside of politics – academic leaders, leaders in the business community, and the like – appointed by the government to serve in parliament.⁸⁹ The rationale for having NMPs is to break out of the possibly self-reinforcing effects of “group think” within political circles (which is to say, within the PAP) and relatedly to provide the opportunity for new ways of thinking to enter the political system. The system also responded to a widespread perception among PAP leaders that important segments of civil society were so disaffected from politics that they were not

⁸⁷ Thio, *supra* note ---, at 46 (2002).

⁸⁸ <http://www.parliament.gov.sg/members-parliament>.

⁸⁹ Formally the appointments are made by the President (elected separately from the executive government) on the advice of a parliamentary select committee. So far the President has not exercised independent judgment on these appointments.

contributing as much as they could to the nation's governance. The NMPs were a symbol of the government's interest in the contributions civil society could make, signaling to the population generally that the government was open to new ways of thinking. More cynically, Garry Rodan suggests, "[t]his functional representation ... encouraged non-governmental organizations ... to take their politics down a non-partisan path though within a PAP-controlled institution," apparently on the theory that NGOs hoping to have their members chosen as NMPs would abstain from open political opposition.⁹⁰

The government's interest in creating NCMPs and NMPs has another source – an interest in coopting potential opposition.⁹¹ As one NMP told me, serving in parliament gave the member a greater understanding of the government's difficulties in managing a multiethnic city-state. An NCMP leader of the opposition Workers Party also indicated in 2007 that serving in parliament at least rounded off the hard edges of the party's positions.⁹²

Other aspects of Singapore's electoral system, common in other regimes as well, reinforce the PAP's ability to retain power. The official election period is quite short – nine days

⁹⁰ Garry Rodan, "Singapore 'Exceptionalism'? : Authoritarian Rule and State Transformation," in *POLITICAL TRANSITIONS IN DOMINANT PARTY SYSTEMS: LEARNING TO LOSE* 232, 242 (Joseph Wong & Edward Friedman eds., 2008). The NCMPs are not truly "functional" representatives, because there is no obligation for the government to appoint NCMPs who are representatives of specific segments of civil society.

⁹¹ Thio, *supra* note ---, at 31 n. 163 (2002). Professor Thio served as an NMP from 2007 to 2009.

⁹² Sylvia Lim, "The Future of Alternative Party Politics: Growth or Extinction?," in *RENAISSANCE SINGAPORE?*, *supra* note ---, at 239. Lim was elected to parliament in 2011.

between the opening of the campaign and the election – and formal campaigning is prohibited outside that window, although opposition parties continue to operate and distribute information about their positions.⁹³ The government also engages in classic gerrymandering by redrawing constituency boundaries in anticipation of new elections, with an eye to diluting the opportunity for an opposition slate to gain a majority in a GRC.⁹⁴

F. Singapore's Constitutionalism: Characterization and Assessment

Pluralizing the concept of constitutionalism while preserving some degree of analytic clarity poses problems of characterization. As the previous discussion of the “slice and dice” or disaggregated analysis of civil liberties in Singapore suggests,⁹⁵ the most paradigmatic liberal constitutionalist nations regularly fall short of achieving full liberal rights along one or more dimensions. Despite those shortfalls, the nations still ought to be characterized as falling with the category of liberal constitutionalist nations. When, though, do the shortfalls become great enough to warrant placing the system in a different category? More concretely, is Singapore a seriously flawed liberal constitutionalist nation, or an authoritarian constitutionalist one?

As I indicated earlier, Singapore's constitutional system is far from being that of a liberal democracy, and it clearly has authoritarian overtones. The use of “swords of Damocles” and the internalization of constraint by some as a result of long-standing and well-known instances of coercion of others may allow the government to assert control without obvious arbitrary

⁹³ **citation**

⁹⁴ **citation**

⁹⁵ Text accompanying notes --- *supra*.

exercises of power. Yet, that point can be put another way: Perhaps we could describe Singapore's authoritarianism as being exercised with a relatively light hand. Rather than electoral fraud, there is gentle and completely transparent manipulation of the formal electoral system. With some difficulty, political opponents can organize reasonably effectively. And, of course, while worrying about being forced into bankruptcy is not something opposition leaders welcome, neither is it much like being concerned, on waking up at home in the morning, that one will be spending the evening in prison. As Kenneth Paul Tan puts it, "Singapore is not a crudely authoritarian state, but neither does it fit neatly into the familiar theories of liberalization and democratization."⁹⁶

What might explain Singapore's authoritarian constitutionalism? All sympathetic accounts of the system, whether from the PAP or independent academics, point to the government's need to preserve ethnic and religious harmony. In Michael Hor's words, "The need to preserve the peace between the racial components of Singaporean society is never far from official thinking."⁹⁷ As I have heard it described in quasi-racist terms, Singapore was "an island of red in a sea of green."⁹⁸ In a well-known speech, Prime Minister Lee Hsien Loong described "the worst possible" outcome of an election as a "society split[] based on race or religion," which

⁹⁶ Kenneth Paul Tan, "Introduction," in *RENAISSANCE SINGAPORE?*, *supra* note ---, at v.

⁹⁷ Hor, *supra* note ---, at 181. *See also* Rahul Sagar, "What Can We Learn from Singapore?," unpub. Manuscript in author's possession.

⁹⁸ "Green" here is rather clearly a reference to the Muslim populations in Indonesia and Malaysia, with "red" more obscurely referring to ethnic-origin Chinese, Buddhists, and Christians in Singapore.

would “divide the society and that is the end for Singapore.”⁹⁹ As indicated above, some of the system’s institutional arrangements might plausibly be explained with reference to the need to manage ethnic tensions, with collateral (and intended) effects on the government’s self-preservation.¹⁰⁰ Yet, one might fairly wonder whether the scope of the restrictions on freedom is actually limited in ways that this justification would support. In particular, the government appears to treat all forms of political opposition as sufficiently likely to lead to racial or religious division that it is justified in restricting political opposition as such. Perhaps the government is right, given Singapore’s situation, but one might view its actions more skeptically as motivated by an instinct for political rather than national self-preservation.¹⁰¹

With this overview of Singapore’s constitutionalism in hand as an illustration of the possible value of pluralizing the notion of constitutionalism, I turn to an examination of some categories that might help organize such a pluralized notion.

⁹⁹ Speech by Prime Minister Lee Hsien Loong, April 5, 2011, available at http://www.pmo.gov.sg/content/pmosite/mediacentre/speechesinterviews/primeminister/2011/April/Speech_by_Prime_Minister_Lee_Hsien_Loong_at_Kent_Ridge_Ministerial_Forum_2011.html#.UnhMQCeFcoo.

¹⁰⁰ The same might be said of some substantive policies, such as those dealing with the allocation of improvements in public services. For a discussion, see TAN --- *infra*.

¹⁰¹ Cf. BARR & SKRBIS, note --- *supra*, at 252 (suggesting that “Singapore’s two main national myths – multiracialism and meritocracy – are chimeras whose main purpose is to facilitate and legitimise rule by a self-appointed elite, dominated by middle-class Chinese in general, and by the Lee family in particular.”).

III. Absolutist and Mere Rule-of-Law Constitutionalism

A. Absolutist Constitutionalism

Consider first the possibility of absolutist constitutionalism: Imagine an absolute monarchy in which the monarch's decisions are authoritative.¹⁰² The monarch makes decisions after receiving advice from a group of advisers s/he has personally chosen. The monarch chooses the advisers after consulting widely in the nation, by holding discussion sessions with the nation's citizens.¹⁰³ The monarch makes it clear that the advisers provide only advice, and that s/he will make the final decision. There are no mechanisms for formally challenging a decision once taken. But, the monarch allows widespread discussion of policy options before decisions are taken, and criticism of her/his choices afterwards. Sometimes such criticisms lead the monarch to modify the chosen policy, but not always. The monarch's decisions are typically motivated by a combination of concerns – that the decision not undermine and perhaps actually enhance the monarchy's stability (defined as the continuation of governance by the monarch and her/his designated successors), and that the decision promote the welfare of the nation's citizens as the monarch understands their welfare. Finally, the monarch does her/his best to imbue potential successors – children, members of the more extended royal family – with the values that animate the monarch's own choices.

¹⁰² The example is drawn from Bhutan's recent history, but I emphasize that it is stylized, not historically accurate.

¹⁰³ Or, today, by inviting widespread participation in some sort of internet forum.

This is an absolute monarchy, not a constitutional monarchy on the model of Great Britain or Denmark, but a monarchy that should be taken to satisfy the most minimal requirements of normative constitutionalism, and probably quite a bit more than that. The example suggests that McIlwain's dichotomization between will and law misses something: The absolute monarch exercises her/his will, but not despotically (even in the long run), and does not engage in arbitrary rule even though the monarch is not limited by law.¹⁰⁴ If that is correct, the example suggests normative constitutionalism may require a substantial degree of freedom of expression and some informal mechanisms for determining what a nation's citizens believe to be in their interests, but not, importantly, a full-fledged system of democratic representation and accountability.

B. Rule-of-Law Constitutionalism

¹⁰⁴ To be clear: The monarch is not *institutionally* constrained to refrain from acting arbitrarily, and for that reason one might say that the monarch's behavior is not "constitutionalist." Whether restraint due to socialization rather than institutions ought to be regarded as enough to qualify a regime as constitutionalist is an interesting and important question for the pluralizing project. Reflecting on the literature on political constitutionalism, at present I am inclined to think that socialization that substantially reduces the risk of arbitrary action should count as constitutionalist. For examples of that literature, see RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007); *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* (Keith Ewing et al., eds. 2011).

(1) *The basic requirements of mere rule-of-law constitutionalism.* Mere rule-of-law constitutionalism is another variant. Mere rule-of-law constitutionalism is a system that satisfies such core rule-of-law requirements as publicity, prospectivity, and generality.¹⁰⁵ Consider a stylized example of a system that satisfies those requirements but is not fully normatively

¹⁰⁵ The list is of course taken from LON FULLER, *THE MORALITY OF LAW* (1964). Fuller includes eight items in his list of the rule of law's characteristics, and I limit my example to those in the text solely for expository reasons. Fuller appears to believe that legal systems that conform to the rule of law are highly likely (or even certain) to conform as well to full normative constitutionalism understood more thickly, incidentally though not definitionally or deductively. *See also* T.R.S. Allan, "Accountability to Law, in *ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION* 77, 85 (Nicholas Bamforth & Peter Leyland eds., forthcoming 2014) ("Compliance with the rules of natural justice ... is as important an aspect of the rule of law as the conformity of enacted rules with the constraints of formal or procedural legality (generality, clarity, publication, prospective effect and so forth."). *But see id.* at 90 (suggesting that this analysis is "an attempt to understand [aspects of] ... the specific conditions of the British legal and political order."). For a recent contribution to the discussion of whether the concept of the rule of law necessarily incorporates some fundamental human rights, see Peter Rijpkema, *The Rule of Law Beyond Thick and Thin*, 32 *L. & PHIL.* 793 (2013) (arguing that the criteria Fuller and others identify as defining characteristics of the rule of law are predicated on a conception of those subject to law's directives that implies that they have fundamental rights). This Article is not the place to develop my view that this is mistaken, although the very enterprise of describing mere rule-of-law and authoritarian constitutionalism rests on that view.

constitutionalist.¹⁰⁶ The government arrests a critic, charging him with violating a statute prohibiting the public distribution of statements likely to cause racial disharmony, by publishing a newspaper editorial criticizing the government's policies on affirmative action. The judge before whom the prosecution is brought dismisses the prosecution on the ground that the editorial did not violate the statute because it was unlikely to cause racial disharmony. The judge orders the critic released. As the police are completing the paperwork to accomplish the release and then putting the critic in a taxicab to take him home, the government passes a new statute making it a crime to criticize government policies on affirmative action. The statute defines "criticizing" to include the failure to withdraw from public access statements made before the statute's enactment. When the critic steps out of the taxicab at his house, the police arrest him for violating the new statute.¹⁰⁷ Holding the critic liable is, I believe, consistent with the minimal requirements of the rule of law: The new statute is public, general, prospective, and capable of

¹⁰⁶ The example is loosely based on an incident in Singapore's constitutional history, modified to bring out "mere rule-of-law" features. The case on which it draws is *Chng Suan Tze v. Minister of Home Affairs*, [1989] 1 MLJ 69 (Singapore Court of Appeal). For details on the *Chng* case, see Thio, *supra* note ---, at 58-60.

¹⁰⁷ Assume that the critic has a cell phone with him in the taxicab, so that he could receive notice of the new statute's adoption and could direct supporters to withdraw the editorial from public availability.

being complied with.¹⁰⁸ But, I think it clear that the government's action is inconsistent with full normative constitutionalism.

Now generalize the government's behavior, so that the example is not a simple one of a violation occurring within a normatively constitutionalist system but is rather a typical example: The government is alert to challenges, does its best to anticipate them, alters the laws in place whenever it discovers a problem but does so consistent with the requirements of publicity, generality, prospectivity, and the like. We then have mere rule-of-law constitutionalism.¹⁰⁹ As with absolutist constitutionalism, mere rule-of-law constitutionalism conforms to some of McIlwain's criteria but not others: The government is limited by law and, to the extent that it

¹⁰⁸ Fuller's list requires some degree of stability in law. A single modification provoked by a newly perceived problem would not, I think, be inconsistent with that requirement.

¹⁰⁹ In my judgment Gordon Silverstein, "Singapore: The Exception that Proves Rules Matter," in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73-101 (Tom Ginsburg & Tamir Moustafa eds., 2008), ascribes rule-of-law constitutionalism, not authoritarian constitutionalism, to Singapore. See also Carlo Guarnieri, "Judicial Independence in Authoritarian Regimes: Lessons from Continental Europe," in *JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* (Randall Peerenboom ed. 2010), 233, 243 (defining "a 'thin' version of the rule of law" to mean that "political power must follow general rules and, although it can alter those rules, it can do so only following previously enacted procedures"), 245 (relying on Silverstein, *supra*, for the suggestion that Singapore has a "thin" version of the rule of law).

responds to challenges only after the event, perhaps we ought not describe it as completely despotic, and yet the government seems not truly limited or non-arbitrary at least in potential.

I have not described the mechanism by which the rulers of a mere rule-of-law regime are chosen. But, they *could* be chosen in reasonably free and fair elections. Both political theory and empirical observation suggest that we cannot rule out in advance the possibility that large, even overwhelming majorities within a defined population will prefer illiberal policies. If they do, mere rule-of-law constitutionalism can be created and sustained through reasonably free and fair elections. We can then describe the systems as illiberal democracies.¹¹⁰

(2) *A note on judicial independence as a component of mere rule-of-law constitutionalism.* Jeremy Waldron and others have suggested that “mere” rule-of-law constitutionalism requires more than prospectivity and the like. For Waldron institutions associated with an independent judiciary are essential components of the most minimal rule-of-

¹¹⁰ See ZAKARIA, *supra* note ---. Graham Walker, “The Idea of Nonliberal Constitutionalism,” in NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 154 (Ian Shapiro & Will Kymlicka eds. 1997), uses the term in a philosophically grounded account that treats “liberal constitutionalism” as resting on a philosophical commitment to neutrality among views of the good and a consequent commitment to purely individual rights. As a result, he treats Israel as a (possibly) illiberal constitutional state. See, e.g., *id.* at 159. For my more institutionally oriented purposes, Graham’s account sweeps too much into the category of illiberal constitutionalism. See also TAN notes --- *infra* [Asian values discussion].

law state.¹¹¹ Yet, even adding independent courts to the requirements does not add much, in my view, once we examine the idea of judicial independence in more detail.¹¹² First, the desideratum is not judicial independence alone, but rather judicial independence coupled with accountability to law.¹¹³ Accountability to law, in turn, consists in making decisions that are palpably legal – that rely on materials and use methods of reasoning that all well-socialized lawyers would treat as legal in nature. On this understanding of accountability to law, such accountability necessarily has a sociological component. In some legal systems, decisions referring to revealed truths would be palpably legal, in others not.

Consider then a legal system in which judges are generally socialized into accepting positivist accounts of law as correct. In such a system Waldron's requirement that a rule-of-law state have independent judges accountable to law adds little to the basic requirements of prospectivity and the like, at least as long as the judges can dispose of their cases solely with reference to positive law.

¹¹¹ Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in *NOMOS L: GETTING TO THE RULE OF LAW* 3 (James Fleming ed. 2011). In the text I discuss only judicial independence, but I believe that other features of Waldron's account either are parasitic on judicial independence or are subject to difficulties analogous to the ones I discuss.

¹¹² The next few sentences summarize an argument made in more detail in Mark Tushnet, "Judicial Accountability in Comparative Perspective," in *ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION* 57, 68-72 (Nicholas Bamforth & Peter Leyland eds., forthcoming 2014).

¹¹³ Without the latter, independent judges can act arbitrarily and so anti-constitutionally.

But, perhaps even positivist judges will regularly confront cases falling into the interstices of positive law. A Singaporean case is instructive. The background is the famous British case of *Liversidge v. Anderson*.¹¹⁴ That case involved an internal security statute authorizing the Home Secretary to place in detention camps people as to whom he had reasonable cause to believe had hostile associations. The court of appeal held that the statute required only that the Home Secretary have such a belief – a so-called “subjective” test – and did not require that the belief be objectively reasonable. The Singaporean parallel is *Chng Suan Tze v. Minister of Home Affairs*.¹¹⁵ The relevant statute there authorized detention if the President “was satisfied” that detention was necessary to prevent the person from disrupt national security. The Singapore Court of Appeal held that it was insufficient that the President be subjectively satisfied that the detainee posed a threat. Rather, there had to be some objective basis for that belief. The problem in *Liversidge* and *Chng* arises in what I have called the interstices of positive law, here the failure of the positive law to set out whether the test is subjective or objective.

Even a positivist judge can infuse substance – here, a preference for liberty – in these interstices. But, in a mere rule-of-law state, the government can fill the gap once it is brought to its attention, as indeed happened in Singapore: Parliament responded to the *Chng* decision by amending the relevant statute to make it clear that the test was a purely subjective one.¹¹⁶

Thereafter a positivist judge would be bound to follow the positive law.

¹¹⁴ [1942] AC 206.

¹¹⁵ [1989] 1 MLJ 69 (Singapore Court of Appeal).

¹¹⁶ **Citation.** For an analogous example, see TEO SOH LUNG, *BEYOND THE BLUE GATE*:

RECOLLECTIONS OF A POLITICAL PRISONER 188-94 (2011) (describing the author’s momentary

In sum, judicial independence is an important additional component to mere rule-of-law constitutionalism only if we assume that judges are not positivists.¹¹⁷ That might be true in some societies, but it is rather clearly a contingent feature of judging that will depend on a range of sociological considerations, including such matters as how the judges are trained and promoted.

(3) *Is mere rule-of-law constitutionalism “constitutionalism” in the proper sense?* One could of course stipulate that the term “constitutionalism” applies only when some substantive requirements are satisfied. What substantive requirements, though? Waldron offers the following list to contrast it with the formal requirements of prospectivity and the like *and* with the procedural requirement of an independent but accountable judiciary: “Respect for private property; Prohibitions on torture and brutality; A presumption of liberty; and Democratic

release from detention because of a technical defect in the detention order, followed immediately by serving her with a new detention order in which the technical defect was corrected). The cited book is a memoir of the detention of a participant in the so-called “Marxist Plot,” discussed at text accompanying notes --- *supra*.

¹¹⁷ I note two qualifications to the argument developed in the text. (1) Perhaps a direct face-to-face confrontation with a litigant will push even a positivist judge into responding in a non-positivist way. (2) Perhaps substantive decisions made in the interstices of positive law will initiate a dynamic that adds more and more substance to the purely procedural elements of mere rule-of-law constitutionalism. For a discussion of a related possibility, see text accompanying notes --- *infra*. I am sufficiently skeptical about both of these possibilities to regard them as at best modest qualifications to the overall argument.

enfranchisement.”¹¹⁸ The point of the contrast is to suggest that *any* substantive requirements are going to be substantially more controversial than the minimal formal and procedural ones. Add anything of substance, in short, and you have more than the mere rule of law.

Still, perhaps the mere rule of law is not constitutionalist at all. Here I revert to McIlwain’s definition, that constitutionalism requires (no more than) restraint on the arbitrary exercise of power. Proponents of the mere rule of law argue, I believe, correctly, that it does constrain *arbitrariness* in the sense of whim and caprice. On McIlwain’s definition, the mere rule of law is therefore constitutionalist. It is of course an exceedingly thin constitutionalism, but if we are willing to pluralize the idea of constitutionalism, even an exceedingly thin version might be a distinctive form of constitutionalism.

IV. Constitutions, Courts, and Elections *In* Authoritarian Societies

Most of the scholarship by political scientists on constitutions in authoritarian regimes is analytically descriptive rather than normative, although it is written against a normative backdrop: If constitutionalism entails limitations on government, and authoritarian regimes are ones in which government is unlimited, why do such regimes even have constitutions? Of course every regime has a *descriptive* constitution, some reasonably regular processes for policy development and conflict resolution.¹¹⁹ Yet, the literature on hybrid regimes seems animated by

¹¹⁸ Waldron, *supra* note ---, at 7.

¹¹⁹ For a discussion of the term “constitution” in a descriptive sense, see Mark Tushnet, “Constitutions,” in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld & Andras Sajó, eds., 2012). *See also* Michael Albertus & Victor Menaldo, *Dictators*

an interest in understanding why such regimes have constitutions that appear to go beyond merely mapping out power relations within the government and yet are not mere shams.¹²⁰ For present purposes, even if this account of some motivations for this literature is inaccurate, analytic descriptions of constitutions in hybrid regimes illuminate some features of authoritarian constitutionalism.

A. Strategic Accounts of Courts and Constitutionalism under Authoritarianism

The most prominent accounts of courts and constitutionalism in nations with authoritarian governments are strategic or instrumental.¹²¹ These accounts purport to show that, from their own point of view, authoritarian leaders benefit from creating independent courts or, more generally, by tying their own hands through constitutional restraints. To frame the

as Founding Fathers? The Role of Constitutions Under Autocracy, 24 ECON. & POL. 279 (2012) (arguing that autocrats adopt constitutions to specify the “rights” of members of the autocratic coalition, apparently using the term *rights* to refer to the prerogatives attached to the positions created by the constitution.).

¹²⁰ On the idea of constitutions as maps of power, see [Okoth-Okendo?]. The 1936 Constitution of the Soviet Union is the usual example of a sham constitution, but there are many additional examples in recent years. For a general discussion, see Law & Versteeg, note --- *supra*.

¹²¹ For the terminology, see, e.g., STEPHEN HOLMES, “The Constitution of Sovereignty in Jean Bodin,” in *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 110 (1995), (referring to “strategically designed limitations on supreme power” and “restraints as *instruments* of princely authority.”).

discussion I use Moustafa and Ginsburg's catalogue of the "functions of courts in authoritarian states":

Courts are used to (1) establish social control and sideline political opponents, (2) bolster a regime's claim to "legal" legitimacy, (3) strengthen administrative compliance within the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime.¹²²

A standard example is the creation of a seemingly independent constitutional court in Egypt under Sadat and Mubarak.¹²³ Those leaders faced domestic opposition and international skepticism about their policy of shifting Egypt from a semi-socialist system to one committed to market liberalization. To assure international lenders that their capital would be protected against expropriation, the leaders created a constitutional court with the power to hold expropriations unconstitutional, and with judges independent of direct control by the regime.¹²⁴

¹²² Tamir Moustafa & Tom Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics," in Ginsburg & Moustafa, *supra* note ---, at 4.

¹²³ See, e.g., TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND DEVELOPMENT IN EGYPT* (2007).

¹²⁴ See also K. Shanmugam, *The Rule of Law in Singapore*, 2012 SINGAPORE J. LEGAL STUD. 357, 357 ("Foreign investment would only come if we could provide the necessary legal certainty. In that sense the Rule of Law was for us not only an aspiration and an ideal (important in itself), but also a necessity borne out of exigency.") Shanmugan, Singapore's Minister for

Putting the argument in general terms: Authoritarian regimes have the power to expropriate property at will. Knowing that, investors will be reluctant to invest in the nation. The regime can provide investors with the assurance that their investments will not be expropriated by embedding a guarantee against the relevant kinds of expropriation in the constitution, and then by establishing courts to enforce that guarantee: “[B]y establishing a neutral institution to monitor and punish violations of property rights, the state can make credible its promise to keep its hands off.”¹²⁵

The difficulty, which arises in different forms with respect to each component of the functionalist or instrumentalist account, lies in explaining why the promise is a credible one, and is again exemplified by the Egyptian experience. The neutral institution – the combination of a constitution and a court enforcing the constitution – is said to make the promise credible. But, just as an authoritarian regime can revoke its promise when its rulers believe that doing so would be to their advantage, so can it eliminate the neutral institution at the same time. If the regime finds the institution useful for other purposes, it can manipulate the court’s jurisdiction and

Foreign Affairs and Minister for Law when he made this statement, refers to the rule of law only, but I believe the statement can fairly be read to support an interpretation that goes beyond the “mere” rule of law.

¹²⁵ Moustafa & Ginsburg, *supra* note ---, at 8.

personnel,¹²⁶ or modify the constitution in a targeted way, to allow the institution to serve – at least momentarily – those other purposes.

Yet, at this point we can see a classic problem of unraveling. Investors learn that the promise was not credible when the regime eliminates the institution’s neutrality to allow expropriation. Observing that development, all those targeted by the other functions, such as securing legitimation or delegating controversial reforms, should anticipate similar responses whenever the constitution or the courts impede rather than promote the regime’s goals.¹²⁷ Knowing that, the targets should not give any special weight to the constitution and courts even when the regime does not interfere with them. Manipulating the constitution or the courts’ jurisdiction with respect to investment and expropriation reveals “the man behind the curtain” with respect to delegating controversial reforms as well.

Strategic arguments may account for the creation of seemingly independent courts, but I suggest that these accounts are flawed because they do not take seriously enough two central features of authoritarianism: The authoritarian leader’s substantive policy preferences need not

¹²⁶ See Steven Levitsky & Lucan Way, *The Rise of Competitive Authoritarianism*, 13 JOURNAL OF DEMOCRACY 51, 56 (2002) (listing impeachment, bribery, extortion, and co-optation as techniques for manipulating the judiciary). I would add manipulation of jurisdiction to their list.

¹²⁷ See, e.g., “Judicial professionalism in China: past, present, and future,” in PROSPECTS FOR THE PROFESSIONS IN CHINA, *supra* note ---, at 78, 90 (discussing the use of the courts by local administrators to “deal with ‘hard cases’ ... to solve administrative headaches”). To the extent that the sources of the headaches know that the local administrators are simply using the courts, it is unclear why they would divert blame from the administrators to the courts.

be “steady,” to use a term introduced by Stephen Holmes,¹²⁸ and the authoritarian leader has lawful power to alter constitutional provisions at will. Writing of Singapore, Ross Worthington makes the point: “the Singapore Constitution is essentially a plaything of executive whim; a rule book for running the school which the council of prefects, with the connivance of the headmaster, may change at will.”¹²⁹

The general structure of my argument is this: If the authoritarian regime’s preferences are “steady,” the mechanisms of constitutionalism and courts do no work, because the regime’s immediate self-interest will lead it to refrain from actions that reduce the returns it anticipates to gain during the period when the preferences are stable. And, if the regime’s preferences change, the mechanisms also do no work because the regime is free to change them to accommodate its new preferences.¹³⁰ That the regime is free to change its preferences is important, because that

¹²⁸ Holmes, *supra* note ---, at 111 (“limitations placed upon his caprice markedly increase his capacity to govern and to achieve his steady aims.”).

¹²⁹ ROSS WORTHINGTON, *GOVERNANCE IN SINGAPORE* 68 (2003). *See also* STEPHEN H. HABER, ARMANDO RAZO & NOEL MAURER, *THE POLITICS OF PROPERTY RIGHTS: POLITICAL INSTABILITY, CREDIBLE COMMITMENTS, AND ECONOMIC GROWTH IN MEXICO, 1876-1929*, at 4 (2003) (“The theoretical problem is that the despot’s commitment to protect property rights is purely volitional.”).

¹³⁰ Perhaps there is a class of preference changes as to which the mechanisms would do some work – changes that the regime might desire to make at the moment but will realize thereafter reduced returns. This is a classic problem of short-sightedness or *akrasia*, about which there is a large and difficult literature. For an introduction, see Sarah Stroud, “Weakness of Will,” *The*

freedom makes it impossible for the current beneficiaries of its constitutional restraints even to calculate the probability that the regime will continue to adhere to its preferences for some defined period. To revert to the Egyptian example: Investors cannot know or even evaluate probabilistically when the regime's leaders will decide that, all things considered, they will be better off expropriating the investments and "take the money and run."¹³¹ They therefore cannot rationally rely on the regime's current assurances, which in turn means that the regime cannot use those assurances for the assumed instrumental purposes.¹³²

Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/fall2008/entries/weakness-will/>. For present purposes I note that it is extremely difficult for a person knowing of the possibility that she will be short-sighted to design institutions *for herself* that will foreclose the possibility of making short-sighted decisions but not ones that, on considered reflection, will be thought appropriate. (The difficulty is that any such institution will have to identify two categories – short-sighted and therefore prohibited and not-short-sighted and therefore permitted – and at the moment of decision the decision-maker will, by definition, place the decision in the second category.)

¹³¹ Idi Amin (Uganda) and Zine El Abidine Ben Ali (Tunisia) are examples of dictators who did take the money and run, both to Saudi Arabia.

¹³² The argument in the text is an informal version of the "last period" problem that leads to unraveling in prisoners' dilemma games with a limited but unknown number of iterations.

Examining the Egyptian example in more detail illustrates the difficulty with purely instrumental accounts of courts and constitutions in authoritarian regimes.¹³³ When the Egyptian constitutional court began to act against regime interests, Mubarak sharply limited its independence by packing the court with his supporters.¹³⁴ Importantly, the investors who were supposed to assured about expropriation could have anticipated this possibility from the outset. That is, given the regime's authoritarianism the possibility existed from the beginning that judicial independence would persist only as long as it served the regime's interests, and that neither the constitutional constraints nor the constitutional court would tie the regime's hands were the regime to become interested in expropriation.¹³⁵

¹³³ For ease of exposition I use the example of guarantees against expropriation, but the argument holds with respect to other guarantees of constitutional rights.

¹³⁴ For the details, see Clark B. Lombardi, *Egypt's Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State*, 3 J. COMPAR. L. 234, 250-51 (2008).

¹³⁵ The strategic account makes sense only if we – or the “targets” of the strategy, here international investors – have a time horizon shorter than that of the authoritarian regime. If so, investors can get their money out before the regime's policy changes. But, the regime's time horizon is unknowable, because at any moment the regime's leaders can take the money and run – that is, calculate that they will be better off by immediately converting all their political power into financial resources and “retiring” to some friendly location, than by retaining power so as to maintain in-coming flows of financial resources. Perhaps many leaders of authoritarian regimes will make the latter choice, but investors – and citizens more generally – cannot know they will.

After sketching Holmes's argument and offering some criticisms of it, I turn to recent strategic accounts of *courts* in authoritarian societies, and conclude this section with a discussion of strategic accounts of *constitutionalism's* benefits to authoritarian rulers.

B. The Strategic Benefits of Constitutionalism to Absolutist Rulers

Holmes's work aims at uncovering some of the intellectual sources of the theory of liberal democracy. He analyzes the work of the "preliberal and nondemocratic theorist" Jean Bodin as the vehicle for laying out the now-familiar argument that liberal democracies can empower the people by taking some potentially contentious issues out of ordinary politics by placing them in a constitution that restricts the ordinary legislature's ability to modify the policy chosen by the constitution's framers.¹³⁶ Because Bodin was not a liberal democrat, Bodin's arguments, as presented by Holmes, were addressed to absolutist rulers: Their absolutism could

Why then do investors invest, especially in large-scale capital projects where the returns will come only over a long period? One possibility is irrationality on their part. Another is that they believe that the regime is interested in more than maximizing its leaders' personal returns (measured by some combination of power and income). That is, they believe that the regime's "steady" preferences include national economic development. But, if the regime's preference set can be expanded in that way, to generate an instrumental justification for constitutionalist commitments, we ought to consider the possibility that it can be expanded in addition to include a normative commitment to constitutionalism as such – in which case we would no longer need an instrumental account for constitutionalism in authoritarian states.

¹³⁶ Holmes, *supra* note ---, at 100.

be enhanced by self-imposed restrictions on power. Holmes quotes John Plamenatz's description of the "paradox": "the king could not rule efficiently without devices to retard his actions."¹³⁷

The structure of the argument is familiar, though not often laid out in full. At time-1, when a constitution is adopted (or an absolutist ruler considers whether to tie his or her hands), the constitution-makers know that there is a set of policy issues as to which their own judgments might not be best for all time: Their own judgment is that they must leave some decisions open to modification in the future. Suppose they believe that their own judgments about the structure of the legislature and about tax and spending policy are within the set of judgments that might not be best for all time. Should they leave both issues open to modification? The hands-tying argument is that they need not, that by foreclosing reconsideration of one issue through ordinary legislation they make it possible to arrive at better policy on the second. Suppose that both the legislature's structure and tax and spending policy are open to modification by ordinary legislation. Political bargaining may lead to compromises with respect to both topics. But, if the issue of legislative structure is taken off the table by placing it in the constitution (even though the constitutionalized structure might not be better at time-2 than some politically available alternative), deliberations and bargaining over tax and spending policy might yield so much better outcomes with respect to those matters as to offset the inability to make improvements in the legislature's structure.¹³⁸

¹³⁷ *Id.* at 108.

¹³⁸ I think that this argument works only on the assumption that the constitution's resolutions of the issues it takes off the table (allowing modification through an amendment process more difficult than the one used to enact ordinary legislation) remains "good enough" in this sense: At

This structure of this argument makes sense, though I wonder how often the empirical predicates necessary for its success are actually satisfied. Note, though, that its success requires that there be policy costs associated with bargaining and deliberation over policy choices: The tradeoffs between policy on legislative structure and tax and spending policy yield worse policies on both matters (net) than would result from accepting a “good enough” legislative structure and devoting all the available political energy to tax and spending policy. On the face of things, the argument might seem inapplicable to absolutist rulers, who – one might think – need not engage in bargaining at time-2.

But, as Holmes points out, even absolutist rulers need some degree of cooperation from their subjects: “If a sovereign breaks his word too often and too frivolously, ... his word will become useless as a tool for mobilizing cooperation.”¹³⁹ Barry Weingast developed this argument in some detail.¹⁴⁰ Weingast asks us to consider a leader who is not, for the moment, constrained in exercising power by any *legal* rules. Still, the leader may be constrained in

time-2 those resolutions are suboptimal relative to alternatives, but the benefits of allowing modification through ordinary legislation of the non-constitutionalized policies offset the losses at time-2 associated with the inability to modify through ordinary legislation the constitutionalized ones.

¹³⁹ Holmes, *supra* note ---, at 111. For a discussion of mechanisms for mobilizing cooperation other “his word,” see [section on cooptation] below.

¹⁴⁰ Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POLITICAL SCI. REV. 245 (1997). My description omits many technical details, but I do not think that doing so for expository purposes invalidates my basic point.

practice because those over whom she rules have enough practical power to resist impositions with which they disagree. Ordinarily, no single subject will have enough power to overthrow the leader, but some groups might, if they can act together. Yet, they will have a problem coordinating their action, for standard reasons: Each one will hold back, hoping that others will take the initiative and overthrow the leader, bringing to them – but not to the laggards – the costs of rebellion. They can coordinate their action if it is “common knowledge” that some action by the leader violates standards accepted by all (or most) subjects. Roughly, they all know that they all will treat some specific action by the leader as a signal that the time for rebellion has come. So, for example, a single act of confiscation can be understood as a threat to the property of all. Generalized: Some notion of constitutionalism, perhaps rather thin, provides a coordination mechanism by identifying actions by the leader that all (or enough) subjects will agree are “violations” that threaten them all. A written constitution can serve as a focal point for this coordination.

The difficulty with this argument is that leaders will rarely announce that they are “violating” agreed-upon rules. Many constitutional provisions will be stated in rather general terms – requiring “just” compensation for takings for public purposes, for example, the scare quotes indicating that sometimes a ruler might be able to represent the just compensation for an expropriation as zero. The constitution taken as a whole is likely to provide support – within itself – for legally plausible arguments that something a critic identifies as a “violation” is actually consistent with the system as a whole, and therefore no threat to the rule of law – and, importantly, therefore no threat to other members of the potential opposition coalition. If participants in the system cannot unambiguously identify actions as violations, the breaches of

the constitution cannot serve as a signal that people should now coordinate cooperative action against the leader.

Some actions might be unambiguous, such as patently arbitrary imprisonment or systematic extrajudicial killings.¹⁴¹ But, again, the word “patently” does a great deal of work here: Typically the leader will offer reasons, from within the complex rule system, that – if accepted – would justify the imprisonment, removing it from the “patently arbitrary” category. Put another way, some violations might be treated as unambiguous, but only at the cost of arbitrariness on the subjects’ part. That is, treating such an action as a violation requires that subjects ignore reasoned arguments that the action is consistent with the constitution as embodied in a relatively thick set of rules in place.

The examples I have given of “good government” justifications for various developments in Singaporean law such as the creation of GRCs and the stringent libel laws illustrate how legal arguments can obfuscate what otherwise might be generally understood as “violations.” Perhaps the departure from tradition will trigger inquiry into whether the change signals the possibility of other, more bothersome changes, or put another way, triggers an inquiry into whether a “violation” has occurred or is likely to occur. And, perhaps the regime will find the costs of responding to such an inquiry too great to bear. Yet, the costs are simply the costs of making reason-based arguments, which do not seem to me likely to be high. Of course critics will treat the good-government justifications as pretexts for what are actually moves toward

¹⁴¹ Mauzy, *supra* note ---, at 55-56, uses the absence of such examples to show that Singapore’s is not a fully authoritarian regime.

authoritarianism, perhaps with a tinge of admiration for “[a]rtful or skillful manipulation.”¹⁴² Not all potential regime opponents will be that cynical (or sophisticated), and the good-government justifications might be sufficient to shift an action from the “violation” category into the “development of the law consistent with constitutionalism” category.

Consider in this connection two examples. (1) The Law Society of Singapore tried to treat the abolition of criminal juries as a departure from inherited traditions that signaled a broader movement toward authoritarianism.¹⁴³ But, the change was not understood as a “violation” in Weingast’s sense because the abolition of jury trials could reasonably be portrayed as promoting efficient law enforcement and as resembling developments elsewhere.

(2) Even where constitutional provisions are clearly and are clearly aimed at obstructing the development of authoritarian rule, eliminating such restrictions might not qualify as a violation either. Experience with constitutionally entrenched term limits for presidents shows that lengthening or eliminating such limits by constitutionally authorized means may not readily be treated, at least widely enough, as a violation.¹⁴⁴ The reason is that the changes are made in apparent compliance with the constitution, not against it – even though the changes might be “anti-constitutional” in some sense.

¹⁴² *Id.* at 58.

¹⁴³ **Citation.**

¹⁴⁴ See text accompanying notes --- *infra* (discussing the restructuring of Venezuela’s constitution in an authoritarian direction by means of mechanisms said to be authorized by the constitution).

Still another related argument is this. The leader provides enough benefits to a key segment of the potential opposition coalition to “buy off” opposition and thereby protect her position.¹⁴⁵ Put another way, there is an “authoritarian coalition” coordinated by the authoritarian party and containing key groups such as the business community or the military or labor unions. Any group with enough independent power to threaten the authoritarian party is paid off to stay within the coalition, while those without such power are kept out. The success of this “divide and rule” strategy requires, first, that the leader have enough resources to buy off the key segment of the potential opposition,¹⁴⁶ and, more important for my purposes, that the key segments believe – probably erroneously – that the leader cannot identify, in sequence, one, then another, key segment to buy off. If members in the key segment understand the possibility of a sequential divide-and-rule strategy, the strategy will unravel for reasons outlined above.

With this general background, I turn now to a more detailed examination of the instrumental uses in authoritarian regimes of courts and other institutional features associated with constitutionalism.

C. Courts in Authoritarian Nations

Functional or instrumentalist or strategic accounts of law, courts, and constitutions are subject to important instabilities, which are especially acute in connection with authoritarian

¹⁴⁵ This model is developed in HABER ET AL., *supra* note ---.

¹⁴⁶ The common observation that the PAP’s success in Singapore depends on achieving and sustaining a high enough level of material prosperity might be taken to support the view that the PAP is pursuing this strategy, and must do so.

regimes. The general point, already made, is simple: Such regimes will use law, courts, and constitutions to achieve these goals only so long as doing so serves the regime's interests. And, because the regime is authoritarian it faces no constraints on abandoning law, courts, and constitutionalism when doing that would serve the regime's interests – or, perhaps more interestingly, when law, courts, and constitutionalism appear to be interfering with the regime's (other) goals.

One difficulty with the various strategic accounts of constitutions and judicial review in authoritarian nations is that they generally do not take the characteristics of authoritarianism fully into account. They describe constitutions as credible commitments by the authoritarian rulers, and judicial review as a mechanism by which some elements of the ruling coalition can monitor the activities of others, typically the chief executive's activities.¹⁴⁷ But, it is puzzling how the commitments can be credible for more than a short period. The authoritarian leader – or, more generally, the dominant party in a dominant-party state – can modify the constitution at will, restrict the jurisdiction of the courts, or even replace the sitting judges.¹⁴⁸ Strategic accounts ignore the possibility that the authoritarian ruler will be able to amend the constitution pursuant

¹⁴⁷ See, e.g.,

¹⁴⁸ Cf. Matthew Stephenson, “*When the Devil Turns...*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUD. 59 (2003) (arguing that party competition is required for the existence of stable forms of judicial independence).

to its own terms, or will have enough power to ignore the constitution's amendment processes and change it extralegally.¹⁴⁹

(1) *Strategic Accounts of Constitutionalism in Authoritarian Societies and the Question of Abusive Constitutionalism*. Recent examples of what David Landau calls “abusive constitutionalism” illustrate the possibility that political leaders with large majorities will modify their nation's constitutions to entrench themselves permanently.¹⁵⁰ That possibility shows why strategic or instrumental accounts of constitutionalism in authoritarian regimes cannot tell the whole story.¹⁵¹

¹⁴⁹ There may be an emerging norm of international law that nations are obligated to follow their own constitutions. See Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, --- WAKE FOREST L. REV. --- (2012), for a presentation of material suggesting this possibility. An authoritarian ruler that chose the second path to constitutional change would have to take the possibility of international condemnation and possible sanctions into account in doing so.

¹⁵⁰ David Landau, *Abusive Constitutionalism*, UC. DAVIS L. REV. (forthcoming 2013).

¹⁵¹ One might include “abusive constitutionalism” as a separate category in a pluralized account of constitutionalism, because it occurs when autocratic political leaders comply with the constitution's express terms. I have not done so here mainly for expository reasons.

Abusive constitutionalism has several features. First, it involves the use of constitutionally permissible methods to modify an existing constitution.¹⁵² Second, it involves the adoption of numerous amendments to the existing constitution. Third, taken individually the amendments may not be inconsistent with normative constitutionalism.¹⁵³ But, finally, considered as a package, the amendments threaten normative constitutionalism.¹⁵⁴

(a) *Hungary*. Hungary's post-communist government operated under a constitution adopted in 1949, but amended substantially in 1989-90 and 1995.¹⁵⁵ To ensure that the one-

¹⁵² The phrase "constitutionally permissible" conceals a small problem. Sometimes abusive constitutionalism employs the mechanisms for amendment embodied the existing constitution. Sometimes it deploys the constituent power directly, but in a non-violent way.

¹⁵³ For example, an amendment that expressly deprived a despised minority of its right to vote would not be an example of abusive constitutionalism as I define it.

¹⁵⁴ This is so for at least two reasons. (1) The new provisions give the political party introducing them an immediate political advantage, given the existing political context, even though one or another might be a simple "good government" reform in other political circumstances. (2) Inserting a single amendment into a constitution occurs without creating troubling or destabilizing interactions with other provisions, whereas introducing numerous amendments might create such interactions.

¹⁵⁵ My account draws heavily on Miklós Bánkúti, Gábor Halmai & Kim Lane Scheppele, *Disabling the Constitution*, 23 J. DEMOCRACY 138 (2012). András Jakab & Pál Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 EUR. CONST'L L. REV. 102

house parliament would support a stable government, the amended constitution gave bonus seats to larger parties, thereby reducing the probability that a winning party would have to form a potentially unstable coalition with smaller parties. In addition, the constitution had a simple amendment rule – two-thirds of a single parliament could amend any provision of the constitution, although a four-fifths majority was required to “set the rules for writing a new constitution.”¹⁵⁶

In April 2010 the conservative party Fidesz, led by Viktor Orbán, won parliamentary elections with 53% of the popular vote. The “bonus” system gave them 68% of the seats in parliament. Fidesz used its supermajority to amend the constitution quite substantially. The provision requiring a four-fifths majority to rewrite the constitution was an “ordinary” provision, amendable by the ordinary two-thirds majority. The Fidesz parliament amended the four-fifths provision to authorize rewriting the constitution according to rules set by a two-thirds majority. It changed the method for selecting judges on the Constitutional Court from one that required cross-party agreement on judicial nominations to one allowing two-thirds of the parliament to nominate and appoint judges, and then restricted the Constitutional Court’s jurisdiction over fiscal matters and questions about the allocation of authority between the executive and parliament, although it preserved the Court’s jurisdiction over many individual-rights claims. The parliament expanded the Constitutional Court’s membership, which had the effect of allowing Fidesz to name a majority of the Court’s members. In addition, the parliament

(2013), provide an account that gives more detail about the constitutional revisions and offer a more tempered account of the revisions’ political implications.

¹⁵⁶ Bankuti, Halmai & Scheppele, note --- *supra*, at 139.

restructured the institutions charged with regulating elections and the media. By altering the membership rules of the Electoral Commission, the Fidesz parliament was able to gain control of the Commission. It gave the Media Council, staffed by Fidesz members, expanded regulatory powers over the press media, though not the internet and social media.¹⁵⁷ Finally, the parliament extended the terms of office of some of the occupants of “watchdog” positions to last beyond the next scheduled election and filled those offices with Fidesz members. These included the national audit office, the public prosecutor, and the office charged with regulating the ordinary courts and supervising judicial nominations for those courts.¹⁵⁸

These constitutional changes altered the form of Hungary’s constitutionalism from standard liberal constitutionalism to something with the potential for becoming authoritarian constitutionalism and, beyond that, pure authoritarianism. As Bánkuti, Halmai, and Scheppele put it:

¹⁵⁷ The Constitutional Court held that the expanded powers could not be used in connection with traditional print media. *Id.* at 141.

¹⁵⁸ The government “walked back” some of the initial amendments. For example, it rescinded an amendment that would allow the term of the head of the national judicial office to be extended beyond its scheduled expiration if parliament is unable to agree on a replacement by a two-thirds majority. The initial amendment, Act CLXI of 2011 on the Organization and Administration of Courts of Hungary was amended in July 2012 to establish a “line of succession” if the position of head of the national judicial office became vacant as the result of the expiration of the head’s term.

Assuming that there continue to be free and fair elections among competing parties in the future, it will be hard for any other party to come to power with this level of political control over all the institutions necessary for democratic elections. Even if another party defies the odds and manages to win an election, however, Fidesz and its loyalists are entrenched in every corner of the state ... These loyalists ensure that there will be multiple choke-points at which Fidesz can stop anything that deviates from its preferences.¹⁵⁹

Importantly for present purposes, all these changes occurred within the existing constitutional framework: Fidesz and its leaders followed all the rules set out in the preexisting constitution and were able to plant the seeds of authoritarian constitutionalism.¹⁶⁰

(b) *Venezuela*. Hugo Chávez was elected president of Venezuela in 1998. Over the next decade he transformed a competitive democratic system into something else – perhaps not an authoritarian constitutionalist one, but certainly a hybrid one.¹⁶¹ Shortly after taking office Chávez set in motion a procedure for constitutional amendment by setting up a “consultative referendum” that would elect delegates to a constituent assembly. The Venezuelan constitution

¹⁵⁹ Bánkuti, Halmai & Scheppele, *supra* note ---, at 145.

¹⁶⁰ For developments in 2013, see Gábor Halmai, *The End of Liberal Constitutionalism in Hungary?*, Int'l J. Const. L. Blog, April 17, 2013, available at: <http://www.icconnectblog.com/2013/04/the-end-of-liberal-constitutionalism-in-hungary>.

¹⁶¹ The term *hybrid* is used in JAVIER CORRALES & MICHAEL PENFOLD, *DRAGON IN THE TROPICS: HUGO CHÁVEZ AND THE POLITICAL ECONOMY OF REVOLUTION IN VENEZUELA* (2011). The account that follows draws on *id.* at 18-40.

authorized the nation's legislature to amend the constitution or to call a constituent assembly by a two-thirds vote. A year before Chávez's election, though, his predecessor had used a consultative referendum, so Chávez's action had some precedent. The legislature challenged Chávez's plan, but in 1999 the Venezuelan Supreme Court held that the referendum process did not violate the constitution, invoking the idea that the nation's people, acting as the constituent power could not be constrained by preexisting law about the processes for constitutional revision.¹⁶² Held in April 1999, the referendum resulted in an 87% vote in favor of convening a constituent assembly. Again with the approval of the Supreme Court, ordinary legislative sessions were suspended while the constituent assembly met. The election rules for the constituent assembly favored the well-organized Chavista party over opposition parties, which put up multiple candidates in each constituency. As a result, Chávez's party held 93% of the seats in the constituent assembly despite having won only 53% of the votes. The constitution drafted in 1999 substantially expanded presidential power. The president's term was lengthened by one year, and reelection to a second term was allowed, and the legislature's upper house was abolished. Importantly, transitional provisions gave substantial authority to a council dominated

¹⁶² For a detailed discussion of the legal issues, see ALLAN R. BREWER-CARÍAS, *DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT* (2010). (Brewer-Carías does not discuss his role, the precise contours of which are contested, in an abortive coup against Chávez in 2002.) *See also* Landau, *supra* note ---, at [draft pp. 16-23]. The theoretical issues associated with the idea of the constituent power are quite complex, and exploring them would take this discussion too far afield. For some brief reflections, see Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983 (2013).

by members of the constituent assembly and other *chavistas*. Using that authority, the transitional council appointed new members to the election monitoring body.

New elections were held in 2000. Chávez's coalition won sixty percent of the seats in the now single-house legislature. The opposition mobilized substantial demonstrations, and attempted a coup, which failed after a few days.¹⁶³ The opposition turned to strikes and similar mobilizations of civil society. Chávez responded by nationalizing the petroleum industry, which had been a major site of opposition. The opposition attempted to recall Chávez. The election monitoring board, which *chavistas* controlled because of the transitional laws, enforced rules that made it difficult to invoke the constitution's recall provisions, but eventually the monitoring board agreed that the recall petition had enough signatures. The recall election was scheduled for August 2004. Chávez met the threat by a massive increase in public spending – from oil revenues --, distributed to the nation's poor. Chávez defeated the recall, winning 59% of the vote. The opposition, disheartened, "simply collapsed."¹⁶⁴ Chávez's opponents, identified through a computerized list, found themselves shut out of jobs, public contracts, and other

¹⁶³ Corrales and Penfold refer to these events as a "series of coups ... Chávez's coup against institutions of checks and balances, the military coup against Chávez, Carmona's coup against the constitution and elected officials, and the civil-military coup against Carmona," *id.* at 22, but I think it important that Chávez's actions, while perhaps an example of abusive constitutionalism, were consistent with the constitutions in place at the time. Notably, his initial moves were approved by a Supreme Court whose members predated Chávez's accession to the presidency.

¹⁶⁴ *Id.* at 27.

“social benefits.”¹⁶⁵ Legislative elections were held in December 2005. The opposition boycotted the elections, so *chavistas* took complete control over the legislative process.

The next presidential election took place in 2006. The opposition objected to various features of the election rules, and the government responded with what two analysts critical of Chávez call “partial reforms,” including election monitoring. Corrales and Penhold note that the election monitors did not find “evidence of rigged voter registration, but they did confirm that the system did not fully protect against voting by unregistered voters.”¹⁶⁶ They note as well that the government removed fingerprint machines from some polling places but kept them in poorer communities, where Chávez’s support was highest. According to Corrales and Penhold, “The opposition claimed that by keeping fingerprint machines in these key polls, the government was deviously playing a ‘psychological’ game: encouraging people to question the secrecy of the vote, which would boost abstention rates among opposition voters.”¹⁶⁷ Chávez won the election, which the opposition conceded to be basically free of fraud, with 63 percent of the vote, “the widest margin and highest voter turnout in Venezuelan history.”¹⁶⁸ Having achieved power, Chávez consolidated it through a number of statutes and decrees that further centralized power in the presidency. But, notably, Chávez’s call for constitutional amendments further enhancing presidential power, including an elimination of term limits, failed in a referendum held in

¹⁶⁵ *Ibid.*

¹⁶⁶ *Id.* at 30.

¹⁶⁷ *Id.* at 30-31.

¹⁶⁸ *Id.* at 32.

December 2007. Persistent, Chávez held another referendum in February 2009, confined to the term-limits issue. The amendment was approved by 55 percent.

The Venezuelan case resembles the Hungarian one: Authoritarian rules were put in place through methods that complied with the existing, liberal constitution. Corrales and Penhold call some of Chávez's early actions a "coup," but the term is merely metaphorical. The actions they describe may have been anti-constitutional in intent and in the goals they sought, but they were all consistent with the constitution in place.

(c) *Conclusion.* The examples of abusive constitutionalism in Hungary and Venezuela are somewhat different from authoritarian constitutionalism as practiced in Singapore. The PAP *could* disable the opposition by grossly manipulating constitutional rules, but has not done so with nearly the vigor we can see in Hungary and Venezuela. I speculate that the difference is that the political leadership in Hungary and Venezuela were not committed to the idea of constitutionalism as a constraint on power, and so were willing to use constitutional forms to achieve anti-constitutional goals, whereas the PAP's leadership is committed to a recognizable form of constitutionalism. If so, the normative commitment to constraints on public power, which I extracted from my description of how constitutionalism operates in Singapore, might be a truly distinguishing characteristic of authoritarian constitutionalism.

(2) *Constitutionalism in Authoritarian Regimes: The "Dual State."* A more general account of instrumental uses of constitutional forms comes in the suggestion that courts in authoritarian systems can be an important component in what Ernst Fraenkel called a "dual

state.”¹⁶⁹ As the term suggests, dual states have two components. In one democracy reigns and independent courts administer law just as they do in liberal democracies. In the other arbitrary rule prevails. Fraenkel’s example was Nazi Germany, and Jens Meierhenrich applied the concept to apartheid South Africa. The key to maintaining a dual state is defining the line that divides its two components. Nazi Germany and apartheid South Africa did so on the basis of ascriptive characteristics (religion and race respectively), a definition that might seem easy to administer.¹⁷⁰ But, nothing in the concept of the dual state requires that the defining characteristic be ascriptive. So, for example, Fraenkel argued that the “arbitrary” state in Nazi Germany administered law on matters that were politically sensitive.

Commentators on Singapore’s political development have invoked ideas that resemble the dual-state concept. They have argued that the Singaporean government offered the rule of law to foreign investors, for example, while maintaining a system of relatively arbitrary rule domestically.¹⁷¹ In the early 2000s Singapore’s political leadership began to focus on attracting

¹⁶⁹ For an extensive discussion of Fraenkel’s analysis and an application to apartheid South Africa, see JENS MEIERHENREICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652-2000* (2008). For a briefer, more general description of “dual state” ideas, see Guarnieri, *supra* note ---, at 238-39.

¹⁷⁰ PIERRE VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 18 (1981), uses the useful term “*Herrenvolk* democracy” to describe “regimes ... that are democratic for the master race but tyrannical for the subordinate groups.”

¹⁷¹ See, e.g., Sim, *supra* note ---, at 321-22 (referring expressly to the dual-state idea and asserting in connection with Singapore, “The law is ... bifurcated, insofar as commercial law

the “creative” class to the city-state, a cosmopolitan group that would drive innovation forward but the members of which wanted relatively high degrees of freedom for themselves.¹⁷² Again, a dual state – civil liberties for the cosmopolitans, arbitrary rule for the rule – might seem workable.¹⁷³

remains depoliticized and paramount to encourage investment, facilitated through strong legal institutions, yet there is no expansion of rights in the public sphere.”); Thio, *supra* note ---, at 7 (“a dichotomous or ‘schizophrenic’ approach towards the role of law and legal institutions appears to be maintained between commercial law matters and issue relating to social justice, civil society, and individual rights.”).

¹⁷² Kenneth Paul Tan, “Censorship in Whose Name,” in *RENAISSANCE SINGAPORE?*, *supra* note ---, at 76 (observing that Singapore’s “new economy” is based on creativity).

¹⁷³ The “cosmopolitan” version of the dual state faces a special problem: Cosmopolitans might value not merely their own freedom but the freedom of those in the nation where they are located. One might develop a suggestive but controversial contrast between the interest of cosmopolitans in sexual freedom, which might perhaps be satisfied by ensuring that cosmopolitans but no one else have sexual freedom, with their interest in freedom of expression, which they might wish extended to all. (The point of the example is not to identify actual interests of cosmopolitans, but to indicate a theoretical possibility; the reverse might be true as well – cosmopolitans interested in sexual freedom for all, but interested in freedom of expression only for themselves.) The dual state might be maintained even with respect to freedom of expression if the state is able somehow to keep the cosmopolitans ignorant of the conditions

What we might call the Niemöller problem poses the primary difficulty for maintaining a dual state.¹⁷⁴ The line dividing the non-arbitrary state from the arbitrary one has to be drawn by the very people who administer both the arbitrary and the non-arbitrary state, and they can provide no guarantees that in doing so they will act pursuant to the rule of law rather than arbitrarily.¹⁷⁵ As a result, people whose actions are *currently* allocated to the regular or independent judicial system should not be confident that when the time comes to appear before a court, they will in fact be brought into that system.¹⁷⁶ And, once again reasoning backward, people should generally assume that their actions might come within the jurisdiction of the political system. The regime then loses the strategic benefits it sought from the dual state.

elsewhere in the nation. For a brief discussion of these points, see Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985, 997-98 (2009).

¹⁷⁴ I refer here to the famous statement by Pastor Martin Niemöller, “First they came for the communists, and I didn’t speak out because I wasn’t a communist.... Then they came for me, and there was no one left to speak for me.” The statement exists in various versions.

¹⁷⁵ As the core examples of Nazi Germany and apartheid South Africa indicate, even lines drawn on the basis of ascriptive characteristics can move arbitrarily, as shown by the Nuremberg laws defining the category “Jew” and the existence of the category “coloured” respectively.

¹⁷⁶ Cf. Frank, note --- *supra*, at 98 (noting that “the [Singapore] government’s willingness to compromise the independence of judges and lawyers cannot be limited to political cases. A judiciary which by its very structure lacks the requisite independence from the government ... retain[s] th[i]s characteristic[] in all cases involving the government or the governing party, not simply in political cases.”).

(3) *Conclusion*. I have examined several versions of strategic or instrumental accounts of courts and constitutionalism in authoritarian regimes. With respect to each version I have argued that it is hard to understand how commitments to constitutionalism could be credible in the strategic sense. As Gretchen Helmke and Frances Rosenbluth put it, “precisely because autocrats are especially well-suited to control the risks associated with judicial independence, we are left wondering just who is fooled by such tactics....”¹⁷⁷

D. Other Benefits of Constitutionalism to Authoritarian Rulers

Authoritarian leaders can use other features of constitutionalism instrumentally. Elections and freedom of expression can reveal information about popular discontent with regime policies and, especially, their implementation. As long as that information does not show such deep levels of discontent as to threaten the regime’s stability, the leaders can use the information to modify policies that are not central to the regime and, again especially, to monitor the performance of the personnel charged with implementing policy. Elections can also serve as a cooptation device, channeling potential regime-threatening opposition onto less threatening paths.¹⁷⁸

(1) *Elections and freedom of expression as information-revealing devices, and some alternatives*. The PAP’s reaction to the results of the 2011 elections shows how authoritarian

¹⁷⁷ Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POLIT. SCI. 345, 358 (2009).

¹⁷⁸ For an overview of the functions elections serve for authoritarian rulers, see Jennifer Gandhi & Ellen Lust-Okar, *Elections Under Authoritarianism*, 2009 ANN. REV. POL. SCI. 403, 404-06.

leaders treat elections as mechanisms for providing them with information. They took the results as a signal that something had gone wrong with their policies, and pledged to adjust – although precisely what had gone wrong, and what adjustments were foreseen, remained unclear.

Elections have their limits as information-revealing devices. They often provide relatively crude indications of popular discontent. The PAP's leaders could take their electoral "defeat" as an indication that they had been doing something wrong, but the results alone could not tell them exactly what that was. Opposition party platforms, and even campaign strategies, may be so comprehensive that drawing specific inferences from popular support of those platforms and strategies would be hazardous.

Perhaps more important, elections are self-limiting as information revealing devices in authoritarian regimes. Opposition parties that move outside the range of criticism the regime finds tolerable – that argue for the complete replacement of the regime, for example, or that stress the deep corruption of the regime's leaders – may find themselves facing severe repression. Anticipating that possibility, opposition leaders will pull their punches, taking care not to exceed the limits of criticism the regime will tolerate. When they do so, though, they inevitably deny the regime some information about failures of policy and implementation that are *not* regime-threatening.¹⁷⁹

¹⁷⁹ Cf. Edmund Malesky, Paul Schuler & Anh Tran, *The Adverse Effects of Sunshine: A Field Experiment on Legislative Transparency in an Authoritarian Assembly*, 106 AM. POL. SCI. REV. 762 (2012) (reporting that an experiment making more transparent the actions taken by legislators in Vietnam's national assembly reduced the legislators' level of activity, and arguing

Authoritarian regimes can use techniques other than reasonably free and fair elections to obtain information about popular views of policy and its implementation. In Russia, for example, the regime has created complaint bureaus – “public reception offices” – that receive complaints on those issues.¹⁸⁰ The bureaus are located outside the ordinary administrative hierarchy, because leaders understand that personnel “on the ground” may be reluctant to report adverse information about popular views on regime policies and will surely be reluctant to report to their superiors their own deficiencies as implementers of policy. The complaint bureaus, like ombuds offices in liberal democracies, bypass line officials to channel information from lower levels to central administrators.¹⁸¹ From an instrumental point of view, the choice between these techniques and reasonably free and fair elections should be determined by the comparative costs of each. And, because holding reasonably free and fair elections poses some risks to the regime, I suspect that the alternative techniques are generally likely to be less costly than holding such elections.

that it did so because transparency reduced the legislators’ willingness to bring to the attention of the regime’s leaders information that might destabilize the regime).

¹⁸⁰ For a description of the complaint bureaus, see WILLIAM J. DOBSON, *THE DICTATOR’S LEARNING CURVE: INSIDE THE GLOBAL BATTLE FOR DEMOCRACY* 22-23 (2012) (observing that the complaint bureaus “provide a direct line of communication for citizens to air their problems, grievances, and complaints to the central government.”). *See also id.* at 23-24 (describing the Russian “Public Chamber,” with a similar function).

¹⁸¹ *See also* LYDGATE, *supra* note ---, at 96-97 (describing Citizens’ Consultative Committees and Residents’ Committee in Singapore that serve as complaint bureaus).

Scholars have suggested that courts can serve similar information-revealing functions, especially in connection with policy implementation. As Carlo Guarnieri puts it, “national rulers are willing to employ courts as a check on local political bosses; the central government will try to establish some channels of influence with lower courts judges, but it will allow some degree of independence of courts from local politics.”¹⁸² Authoritarian regimes, though, must then worry about the possibility that the lower-level bureaucrats and the local courts might corrupt each other through what some scholars of Communist China call local protectionism.¹⁸³ The remedies are some form of centralization – divorcing the local judicial budget from local revenue sources,¹⁸⁴ for example, or creating a readily available mechanism of appeal to some regional or central body.

¹⁸² Guarnieri, *supra* note ---, at 240. *See also* Tom Ginsburg, “Judicial Independence in East Asia: Some Lessons for China,” in JUDICIAL INDEPENDENCE IN CHINA, *supra* note ---, at 249 (“A limited regime of complaints by the public can shine the light on bureaucratic malfeasance, informing the regime center and improving the quality of government.”). *Cf.* Randall Peerenboom, “Judicial Independence in China: Common Myths and Unfounded Assumptions,” in JUDICIAL INDEPENDENCE IN CHINA, *supra* note ---, at 81 (describing practices in China that involve directives from central Communist Party institutions seeking reports from local courts on individual cases).

¹⁸³ *See* Peerenboom, *supra* note ---, at 82-83; Yu Xingzhong, *supra* note ---, at 90-91 (discussing local protectionism).

¹⁸⁴ *See id.* at 83 (observing that the regime in China “has opted for both approaches, ... recommending that the central and provincial levels be responsible for funding the courts.”).

Guaranteeing some degree of freedom of expression clearly has similar information-revealing characteristics. Here the only point worth making is that such guarantees are necessarily self-limiting in an authoritarian regime. As with opposition parties, so ordinary citizens know that the regime sets limits on what sorts of expression it will tolerate, and citizens will therefore steer wide of the “unlawful” zone¹⁸⁵ – and thereby will provide the regime less information than it actually would find useful. As William Alford observes about “rice-roots lawyers” in China, who provide legal services in rural areas, “The very qualities ... that are a part of the allure of rice-roots legal workers for rural Chinese also potentially represent an impediment to these workers serving the same clientele as effectively as they might, lest in vigorously challenging officialdom, rice-roots legal workers jeopardize their own long-term relationship with the powerful.”¹⁸⁶ This self-limiting dynamic applies far more generally.

Some of the arguments about elections and free expression as information-revealing devices rely rather heavily on difficulties officials at the center – the regime’s leaders – face in acquiring accurate information about policy and its implementation on the periphery. These are clearly difficulties of scale, and it may therefore be worth noting that they might not arise in a city-state like Singapore, where the distinction between center and periphery is almost vanishingly thin. The PAP’s leaders can and do visit the city’s neighborhoods without any

¹⁸⁵ I take the phrase from *Speiser v. Randall*, 357 U.S. 513, 526 (1958), and the U.S. law of overbreadth.

¹⁸⁶ William P. Alford, “‘Second lawyers, first principles’: lawyers, rice-roots legal workers, and the battle over legal professionalism in China,” in *PROSPECTS FOR THE PROFESSIONS IN CHINA* 48 (William D. Alford, Kenneth Winston & William C. Kirby eds., 2011), at 62.

logistical difficulties, and they can receive complaints about neighborhood problems directly.

This suggests that Singapore's commitment to reasonably free and fair elections, which I include as part of its authoritarian constitutionalism, rests on something other than elections' utility as an information-revealing technique.

(2) *Elections as cooptation.* Authoritarian regimes are sometimes said to use elections as devices to co-opt or domesticate opposition. One aspect of cooptation is that the regime provides outlets for oppositionist impulses to let off steam without affecting policy by tolerating opposition parties that are consigned to ineffectiveness. Here the puzzle is explaining why the opposition leaders allow themselves to be bought off in this way.¹⁸⁷ Another aspect is that “[e]lections allow leaders to identify the most popular local notables or potential opposition forces” and then “placate [them] by giving them some say over policymaking....”¹⁸⁸ Cooptation is effective because it “takes place in a more stable, institutionalized environment than would be the case in an informal ... arrangement,” and “disagreements ... can be presented in a controlled

¹⁸⁷ Cf. Ellen Lust-Okar, *Elections Under Authoritarianism: Preliminary Lessons from Jordan*, 13 DEMOCRATIZATION 456, 460 (2006) (“the logic underlying ... [arguments that ‘election in authoritarian regimes add legitimacy to the regime’] is not convincing. It suggests that individuals are somehow led to believe ... that their elections ... give them more input into decision-making than they do.”). I put aside the possibility of straightforward corruption: The regime gives opposition leaders material benefits for participating, thereby deterring them from engaging in more vigorous opposition efforts.

¹⁸⁸ Malesky *et. al.*, *supra* note ---, at 765.

and unthreatening manner that will not generate larger protests.”¹⁸⁹ Yet, why the coopted participants would indeed be placated is not entirely clear. Perhaps the regime throws them some scraps on minor policy issues, and the opposition leaders believe that something is better than the nothing the regime might do were they not to participate in elections with effectively predetermined outcomes.¹⁹⁰ Yet, a sophisticated regime could make the minor policy changes on its own, without using elections as a cooptation device, so it remains unclear why authoritarian regimes would use elections for these purposes.¹⁹¹

Again, other institutional mechanisms can substitute for elections as cooptation devices.

¹⁸⁹ *Id.* at 766.

¹⁹⁰ Leaders of Singapore’s main opposition party regularly complain about the limited role they have in Parliament, but, while expressly their discontent, have regularly accepted appointments as NCMPs. [citation]

¹⁹¹ Carles Boix & Milan Slovik, “Non-Tyrannical Autocracies (unpublished ms., April 2007), argue that the regime needs to identify the local notables because the latter have some degree over control over their (local) populations, and maintain it by delivering desired policies to those populations. Yet, in that case, the regime could deliver the policies directly to the population, cutting out the middleman. It seems to me that this account would then become one in which elections serve as information revealing devices.

The PAP leadership in Singapore institutionalized cooptation by creating positions for opposition party members and elites outside the PAP. The NCMP and NMP system places the holders of those on the border between co-optation by election and pure co-optation.¹⁹²

(3) *Elections as intimidation*. Elections can reveal information *about* the regime as well as provide information *to* it.¹⁹³ A regime that wins a reasonably free and fair election by a wide margin can by that very fact discourage opposition. Opponents might think that a narrow margin of victory might have resulted from chance, or from having put up a slightly inferior candidate. But, they might worry, how much effort is it worth to try to shift the electoral margin from 80% against them to 65% against them?

Singapore's 2011 election suggests one difficulty with this strategy, from the authoritarian regime's point of view. Having set expectations for a huge margin of victory, 60% apparently seemed "narrow" to participants in Singapore's political circles.¹⁹⁴ The alternative, of course, is to abandon the commitment to reasonably free and fair elections when electoral margins fall below some reasonably high level. At that point elections no longer intimidate the

¹⁹² As with reasonably free and fair elections as information-revealing devices, here too the choice of such elections or alternative methods of cooptation should, from an instrumental point of view, be determined by relative costs.

¹⁹³ See ALBERTO SIMPSON, WHY GOVERNMENTS AND PARTIES MANIPULATE ELECTIONS: THEORY, PRACTICE, AND IMPLICATIONS (2103) (developing a more general version of this account, including manipulations that exceed the limits of reasonably free and fair elections).

¹⁹⁴ In the 1990s political lore in Singapore had it that an election in which the PAP received less than 80% of the vote would be a disaster for the party.

opposition, but forceful intimidation does. The fact that Singapore appears to be committed to continuing to conduct reasonably free and fair elections provides one reason for thinking that it offers an example of authoritarian constitutionalism rather than pure authoritarianism.

E. Two Qualifications

The argument to this point has been that strategic or instrumental accounts of courts and constitutionalism in authoritarian regimes generally fail because of the problem of unraveling. That problem might not arise in two circumstances: transitional periods and when the experience of constitutionalism, initially adopted for strategic reasons, sets in train a dynamic process that escapes the regime's control.

(1) *Transitional Periods*. The literature on courts and constitutions in authoritarian societies tends to focus on two time periods. First, it is argued, creating a constitution immediately after an authoritarian regime is established allows the new rulers to deprive their adversaries of any legal basis for asserting power and, probably more important, allows the new rulers to establish a framework allocating power among themselves.¹⁹⁵

¹⁹⁵ ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP (2002); Micahel Albertus & Victor Menaldo, *Dictators as Founding Fathers*, 24 ECON. & POL. 279 (2012). I would think that the new constitutional framework would ratify the informal allocation of power within the new ruling group, and indeed sometimes the literature seems to me to blur the distinction between a written constitution and unwritten constitutions. Here the puzzle is then why the formal allocation of power might continue to have some constraining effect when the actual power relationships change. So, for example, consider a military junta in which the Army, Air Force,

The other period on which the literature focuses is the time when the authoritarian regime is, or is thought by some to be, in irreversible decline.¹⁹⁶ During this period strategic accounts of judicial review in particular are indeed persuasive. Judges in place, anticipating regime change, attempt to figure out what actions will maximize their chances of staying in office through and after the transition. Sometimes, perhaps often, those actions will lead the judges to take stands against the rulers-in-place, who, the judges think, may not be in place much longer.

Strategic accounts may have some purchase quite early in an authoritarian regime's history, and more purchase when the regime has jumped the shark. What they do not provide, though, is an account of authoritarian constitutionalism in stable authoritarian regimes.¹⁹⁷

and Navy chiefs of staff take power and establish a constitution requiring the agreement of two of the three to adopt any policy. Suppose that, within a few years, it becomes apparent that the Navy chief of staff simply lacks sufficient support from the relevant constituencies ("sailors," say) to have any real power. Why won't the Army and Air Force chiefs amend the constitution to eliminate the Navy from the junta? (One might think that the Army's leaders would prefer to maintain the requirement of Navy agreement, to preserve the possibility that they might form a coalition with the Navy against the Air Force. Yet, doing so also preserves the possibility that the Navy would form a coalition with the Air Force against the Army. There may be conditions under which the latter risk is worth bearing, compared to the possibility of engaging in a direct power struggle with the Air Force, but I am skeptical about their actual existence.)

¹⁹⁶ **citations**

¹⁹⁷ In my view, the literature on stable authoritarian regimes locates a great deal of the stability in authoritarian repression, often violent, and fraudulent elections. (Or, at least, reverts to repression

(2) *Dynamic Changes*. Authoritarian rulers might place constitutional constraints on themselves and create enforcement institutions for strategic reasons, believing that they can remove the constraints or restructure the institutions if their preferences change. But, they might find that they have unleashed a dynamic in which the constraints and institutions interact in unexpected ways, creating a dynamic that pushes toward the creation of liberal democracy or a stabilized restructured regime of a sort that I describe as authoritarian constitutionalist.¹⁹⁸ Bruce Rutherford sketches one possible sequence: the regime is weakened by some sort of exogenous crisis; “regime elites try to preserve their power ... by adopting political, legal, and economic reforms” that “create opportunities for competing conceptions of the polity to emerge and grow”; “[i]nstitutions that espouse alternative conceptions ... exploit these opportunities” and the regime “permits this process to proceed either because it is unable to stop it, or because the reforms it produces provide benefits to the regime”; and the result is a regime in which “multiple and electoral fraud as the ultimate foundation of authoritarian stability.) If there is such a thing as authoritarian constitutionalism, it is not going to have either of those features.

¹⁹⁸ ALBERT BEEBE WHITE, *SELF-GOVERNMENT AT THE KING’S COMMAND: A STUDY IN THE BEGINNINGS OF ENGLISH DEMOCRACY* (1933), describes how English kings used the people generally to monitor the behavior of local officials, with the result that the kings, having “so used the English people in government, [and having] laid upon them for centuries such burdens and responsibilities,... went far toward creating the Englishman’s governmental sense and competence....” *Id.* at 2 (summarizing the book’s argument). For a discussion of the use of courts and others institutions in authoritarian societies to monitor official behavior, see TAN --- *supra*.

conceptions of the polity” offered by political entrepreneurs compete in a process of “cooperation, conflict, and innovation” that can preserve the (new) order’s stability.¹⁹⁹ The literature suggests, though without spelling out the mechanisms in detail, that this is especially likely where one of the institutional reforms involves the (initially limited) empowerment of civil society.²⁰⁰ So, for example, perhaps the creation of constitutional courts brings into being a new constituency of activist lawyers who specialize in constitutional litigation. This new interest alters the internal dynamics of interest-group pressure, and may be particularly effective in opposing withdrawal of jurisdiction from the constitutional courts. The empirical evidence for such a dynamic is, in my judgment, thin and speculatively based on pushing anecdotes to their limits.²⁰¹

F. Conclusion

As noted in the Introduction, the preceding Part has been deflationary. I have argued that strategic or instrumental accounts of the adoption of constitutionalism in authoritarian regimes are generally flawed. That does not mean, of course, that authoritarian regimes are constitutionalist. It does suggest, though, that if we observe persistent constitutionalist features in

¹⁹⁹ BRUCE K. RUTHERFORD, EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD 27-28 (2008).

²⁰⁰ For additional discussion, see text accompanying notes --- *infra* (discussing the role of civil society in providing information to authoritarian rulers).

²⁰¹ The primary anecdote involves the Lawyers’ Movement in Pakistan. For a discussion, see, **citation to Law and Social Inquiry article.**

authoritarian regimes, we might conclude that those features serve the regime's goals, but those goals might not be "merely" instrumental. Perhaps, for example, the authoritarian ruler has a normative commitment to advancing the nation's honor, and concludes that constitutionalism will help do so. Or, perhaps, these authoritarian rulers have a direct normative commitment to some degree of constitutionalism.²⁰² In the latter case, authoritarian constitutionalism would then be part of the pluralized universe of constitutionalism.

V. Authoritarian Constitutionalism

How can authoritarian constitutionalism be distinguished from (mere) authoritarianism and rule-of-law constitutionalism? For present purposes, constitutionalism is normatively weighted, not necessarily applicable to all states that have written constitutions, even written constitutions setting out institutional arrangements and individual rights. The 1936 Constitution of the Soviet Union had such a constitution, but the Soviet Union was fully authoritarian. I take as a rough definition of authoritarianism that all decisions can potentially be made by a single decision-maker,²⁰³ whose decisions are both formally and practically unregulated by law, though as students of authoritarian constitutions have emphasized, they might be regulated by conflicts

²⁰² Formally, the argument in the text is that we should take the rulers' utility functions to include both their own material well-being and something else, such as advancing national honor or respecting constitutionalism.

²⁰³ Which might be a collective body, such as the Central Committee of the Chinese Communist Party. He and Warren use the term "command authoritarianism." He & Warren, *supra* note ---, at 273.

of power,²⁰⁴ even rather structured and predictable conflicts.²⁰⁵ Constitutionalists differ on the content of normative constitutionalism, and I do not intend to take a position on anything other than what its broad boundaries are.

A. Some Characteristics of Authoritarian Constitutional Regimes

My discussion of the role of courts and constitutions in authoritarian regimes suggests some of the characteristics of authoritarian constitutional ones, which I sketch next.

(1) The regime, which for expository convenience I will assume is controlled by a dominant party, makes all relevant public policy decisions, and there is no basis in law for challenging whatever choices the regime makes. This is what makes the regime authoritarian.

(2) The regime does not arrest political opponents arbitrarily, although it may impose a variety of sanctions on them, such as the risk of bankruptcy from libel judgments in Singapore.

²⁰⁴ This definition implies that political constitutionalism, as discussed in the British literature, must describe politics as more than a mere power struggle, the precipitate of which yields normative constitutionalism, but as implicating in politics itself arguments about law.

²⁰⁵ It is probably worth noting that an authoritarian regime might *choose* to implement normative constitutionalism, on the condition that it remain free to replace it at any time. As one Chinese informant put it to me, “The People’s Republic of China could have a real constitution whenever the Central Committee of the Communist Party wanted it – and for as long as the Central committee wanted it.” The regime would have to consider the possibility that doing so would unleash the dynamic process discussed in Part --- *supra*..

(3) Even as it employs such sanctions, the regime allows reasonably open discussion and criticism of its policies. The regime's critics find themselves able to disseminate their criticisms even after they have been sanctioned. The Singaporean libel judgments impoverish the government's critics, but they still have access to resources through friends and family who are not themselves active critics of the government (and therefore cannot be sanctioned because of the limitations rule-of-law constitutionalism places on the regime).²⁰⁶

(4) The regime operates reasonably free and fair elections, with close attention to such matters as the drawing of election districts and the creation of party lists to ensure as best it can that it will prevail – and by a substantial margin – in such elections. Fraud and physical intimidation occur, if at all, only sporadically and unsystematically. As Carlos Casteneda put it, referring to Mexico, the dominant party was “no ‘tea party’” but “[r]epression was truly a last resort.”²⁰⁷ Levitsky and Way describe competitive authoritarianism as combining both occasional “high-intensity coercion” and more routine “low-intensity coercion.” The latter

²⁰⁶ For a description of how Jeyaretnam conducted his life after bankruptcy, see Obituary, “Joshua B. Jeyaretnam: Singapore Opposition Leader,” Oct. 1, 2008, Times Online, available at <http://www.timesonline.co.uk/tol/comment/obituaries/article4855720.ece> (visited Sept. 28, 2011). *See also* HARDING, *supra* note ---, at 99 (describing the detention of a Malaysian opposition leader who continued to be “an effective and indefatigable Leader of the Opposition.”).

²⁰⁷ *Quoted in* BEATRIZ MAGALONI, VOTING FOR AUTOCRACY: HEGEMONIC PARTY SURVIVAL AND ITS DEMISE IN MEXICO 10-11 (2006). The reference is to the famous statement by Mao Tse Tung, “Revolution is not a tea party,” not to the Tea Party movement in the United States.

includes “surveillance ... low-profile physical harassment ..., denial of employment, scholarships, or university entrance to opposition activists; denial of public service ... to individuals and communities with ties to the opposition; and use of tax, regulatory, or other state agencies to investigate and prosecute opposition politicians, entrepreneurs, and media owners.”²⁰⁸ Authoritarian constitutional regimes lower the intensity of coercion even more, as with Case’s example of denying upgrades in services, not the services themselves, to districts where the opposition is strong.

(5) The dominant party is sensitive to public opinion, and alters its policies at least on occasion in response to what it perceives to be public views. Its motivation for responsiveness may be mixed, though a desire to remain in power dominates other motivations such as judgments about what is in the nation’s best interests.

(6) It may develop mechanisms to ensure that the amount of dissent does not exceed the level it regards as desirable. Magaloni focuses on the hegemonic party’s efforts to keep whatever dissent occurs within its ranks, by holding out the prospect of rewards not only to party loyalists but to party activists who challenge the party from within. “Co-optation is better than exclusion” because it allows the hegemonic party to achieve the massive victories it requires.²⁰⁹ I have already described some of Singapore’s mechanisms for cooptation. There are of course less formal methods of cooptation. For example, Singapore is said to have an extremely effective system of early talent-spotting, through which promising young people are noticed in the

²⁰⁸ Levitsky & Way, *supra* note ---, at 58.

²⁰⁹ MAGALONI, *supra* note ---, at 16.

universities and channeled into government-supporting positions of power.²¹⁰ These mechanisms of co-optation may have the collateral effect of increasing the regime's responsiveness to public opinion and criticism.

(7) Courts are reasonably independent, and enforce basic rule-of-law requirements reasonably well. Although judges, especially those on higher courts, are likely to be sensitive to the regime's interests because of the judges' training and the mechanisms of judicial selection and promotion, they rarely take direct instruction from the regime. Sometimes, indeed, they might reject important regime initiatives on rule-of-law or constitutional grounds. But, the system of constitutional review will necessarily be weak-form, with the regime having the power to alter the constitution so that its initiatives conform to the courts' interpretations.²¹¹

B. The Role of Ideology

Authoritarian leaders often articulate a comprehensive ideology they use to justify the unrestrained exercise of power – revolutionary Marxism, Peronism, *chavismo*.²¹²

²¹⁰ For a summary of that system, see BARR & SKRBIS, note --- *supra*, at 70-71. That summary is elaborated more completely in the remainder of the cited work.

²¹¹ Building weak-form review into the constitution's structure may be affirmatively desirable, because it openly describes the system's actual functioning. Writing strong-form review into the constitution, in contrast, raises the possibility that the regime's actions in response to judicial rulings will reek of hypocrisy.

²¹² **For a discussion of authoritarian ideologies, see**

Constitutionalism is an ideology that justifies both the use of power and its justified restraints.

Can authoritarianism be combined with constitutionalism into a distinctive regime ideology?

The so-called Asian values debate in the 1990s suggested one possibility, briefly pursued by Lee Kuan Yew. According to him, “In the East the main object is to have a well-ordered society so that everybody can have maximum enjoyment of his freedoms.”²¹³ Individuals were not “pristine and separate,” but had to be seen in a wider context, first of their families, then “friends and the wider society.”²¹⁴ Similarly, as summarized by Bruce Rutherford, some proponents of Islamic constitutionalism see the state “as a carefully maintained path that directs state power toward the transformation of individual Muslims and the creation of a more pious community.” Constitutionalism “ensure[s] that the state stays on this path and fully achieves its potential to change individuals and society.”²¹⁵

²¹³ Fareed Zakaria, “Culture is Destiny: A Conversation with Lee Kuan Yew,” *Foreign Affairs*, vo. 73, no. 2 (March-April 1994), pp. 109, 111. For the background of Lee Kuan Yew’s thought, see Michael D. Barr, *Lee Kuan Yew and the “Asian Values” Debate*, 24 *ASIAN STUDIES REV.* 309 (2000).

²¹⁴ *Id.* at 113.

²¹⁵ RIUTHERFORD, *supra* note ---, at 126. *See also* Li-Ann Thio, “A Bill of Rights Without a ‘Rights Culture’? Fundamental Liberties and Constitutional Adjudication in Singapore,” in *COMPARATIVE CONSTITUTIONAL LAW* 303, 319 (2nd ed., Mahendra P. Singh ed., 2011) (summarizing “the government’s preferred ‘national ideology’ as expressed in a 1992 White Paper as “nation before community and society above self; ... regard and community support for the individual; ... consensus instead of contention; and ... racial and religious harmony.”).

The Asian values debate became exhausted when participants realized that, as articulated by its proponents, “Asian values” were not an alternative to constitutionalism but a version of it,²¹⁶ what one analyst called “republican communitarianism.”²¹⁷ It differed from “Western” versions of constitutionalism only in the degree to which standard limitations on individual rights were used to justify government policies. So, for example, limitations clauses in the European Convention on Human Rights – an undeniably liberal constitutionalist document – authorize limitations on the right to private and family life “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of the rights and freedoms of others,” and on the right to freedom of expression “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”²¹⁸ As formulated, if not as applied by the European Court on Human Rights, these phrases fit comfortably within Lee Kuan Yew’s articulation of “Asian values.” As Surain Subramaniam puts it, perhaps “Asian values are not much more than conservative western values” – values, I would stress, that are part of the

²¹⁶ *But see* Rodan, *supra* note ---, at 242 (asserting that “the ideological utility of ... Asian values diminished, not least because with the onset of the Asian financial crisis of 1997, the ‘Asian way’ became too closely associated with corruption and economic mismanagement.”).

²¹⁷ The phrase comes from Neera Badhwar, quoted in Barr, *supra* note ---, at 312.

²¹⁸ European Convention on Human Rights, Arts. 8 (2), 10 (2).

general constitutionalist tradition.²¹⁹ Seen in this way, the Asian values debate is a debate within that tradition.

The ideology of authoritarian constitutionalism can be understood as lying near one end of a spectrum running from strong libertarianism through U.S.-style liberalism and the European tradition of social democracy to a constitutionalism that freely invokes standard justifications for restrictions on individual freedom. Importantly, though, authoritarian constitutionalism is constitutionalist because it invokes *standard* justifications, not ones flowing from a distinctive authoritarian ideology.

The Asian values debate ended with its proponents retreating from the position that there were distinctive Asian values ordering their versions of authoritarian constitutionalism, defending those versions instead on pragmatic grounds. Subramaniam offers a good summary of the pragmatic argument:

(a) Western liberal democracy is only one variant, among many, of democratic systems of government; (b) each country has its own unique set of natural, human, and cultural resources, as well as historical and political experiences; (c) the mode of governance or the political system of a country must not only accommodate those unique features but also devise responses that will resonate with the members of the society ...' (d) the legitimacy of any political system, including democracy, must be evaluated according to its ability to achieve certain ends ...; and (e) determining the type of political system that

²¹⁹ Surain Subramaniam, *The Asian Values Debate: Implications for the Spread of Liberal Democracy*, 27 ASIAN AFFAIRS 19, 24 (----)

is to be adopted in a particular society involves finding “the best social and political arrangements by means of a pragmatic and continuous process of experimentation.”²²⁰

So, for example, under the conditions facing Singapore, authoritarian constitutionalism might be “the best ... political arrangement[]” for achieving rapid economic growth – or, as suggested earlier, for maintaining ethnic and religious peace. Whether it is would of course depend on a careful analysis of the available institutional alternatives. Singapore’s multiethnic society might face threats to social order of a different degree than those faced by the United States or other more liberal constitutional regimes. In 1964 Singapore, then a member of the Federation of Malaysia, experienced two significant episodes of ethnic rioting between Chinese and Malay groups. Those conflicts had an important effect on Lee Kuan Yew’s thinking about the appropriate institutional design for Singapore. Maintaining social order through restrictions on individual liberty was the pragmatic authoritarian constitutionalist response.

One hint that pragmatism undergirds Singapore’s regime is its use of sedition law. Historically, authorities have used sedition law to target regime critics.²²¹ Singapore’s authorities use it differently, to target those whose speech threatens to revive ethnic conflict. Perhaps one could fairly describe the speech involved in these prosecutions as hate speech or some analog thereto. If so, perhaps we should treat Singapore as pushing against the limits of liberal

²²⁰ Subramaniam, *supra* note ---, at 22 (citations omitted). *See also* RUTHERFORD, *supra* note ---, at 128-30 (describing the ways in which the “vagueness” of Islamic constitutionalism allowed the Egyptian Muslim Brotherhood to present “a liberal conception of Islamic political order” in the 1980s and 1990s).

²²¹ [citations.]

constitutionalism from within. The United States Constitution has been interpreted to place substantial limits on hate speech proscriptions,²²² but most other liberal democracies have reasonably broad bans on hate speech. Those bans might not be not broad enough to cover the speech at issue in the Singapore cases, which is why I describe Singapore as pushing against the limits, but Singapore's use of sedition to target "quasi" hate speech does not seem to me categorically different from the use of hate speech law in most Western democracies.

None of this is to deny, of course, that the pragmatic defense of authoritarian constitutionalism is ultimately empirical, and that those offering it typically have an interest in exaggerating the extent to which their policies secure social peace and economic growth, as compared to available alternatives. Yet, even so qualified, the pragmatic defense might give authoritarian constitutionalist regimes a degree of normative authority: They achieve socially desirable outcomes engaging in the severe intrusions on individual rights characteristic of fully authoritarian regimes.

C. The Possible Instability of Authoritarian Constitutional Regimes

With the characteristics enumerated earlier, I believe, authoritarian constitutionalism is at least as normatively constitutionalist as the absolute monarchy I described. And, though what I have described is something like an ideal type, Singapore provides some indication that authoritarian constitutionalism is also empirically possible. The pragmatic defense of authoritarian constitutionalism introduces a degree of flexibility and adaptability into such regimes. Yet, the primary question about authoritarian constitutionalism is whether it describes a

²²² See, e.g. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

regime that can be reasonably stable over a reasonably long period.²²³ Other than Singapore, there are few examples of actual systems that appear to fit the description of authoritarian constitutionalism, and some candidates that might have done so at some points have not persisted long.²²⁴ The PAP's leadership provides a good example of what William Case describes as the

²²³ The qualifications are necessary because one cannot demand “permanent” stability of any regime, and because I am willing to concede that fully democratic constitutionalist regimes may persist for longer periods than other constitutionalist ones, but am not willing to concede that such regimes provide the definition of stability we should use. *See also* Thomas Christiano, *An Instrumental Argument for a Human Right to Democracy*, 39 *PHILOSOPHY & PUBLIC AFFAIRS* 142, 157 (2011), which argues that a “consultation hierarchy,” a regime similar to the monarchy I have described, “is not impossible; it is just very unlikely” because its stability depends on sustained choices by the monarch and his/her successors, which cannot be assured.

I put aside as relevant to a different sort of analysis than the one I pursue here the question of the social and economic preconditions to authoritarian constitutionalism, but the point is almost inevitably made in discussions of Singapore that the nation's economic success under the PAP regime has an important role in sustaining the regime.

²²⁴ For example, the Islamic Republic of Iran prior to the 2009 elections might have qualified as an authoritarian constitutionalist regime, but that year's fraudulent presidential election either transformed it into a fully authoritarian regime or confirmed that it was already such a regime.

importance of “skill” in designing institutions that sustain authoritarian constitutionalism.²²⁵ The co-optation mechanisms there are quite cleverly designed.²²⁶

Instability can be resolved in two directions. An authoritarian constitutionalist regime could lose its authoritarian character and become fully constitutionalist,²²⁷ or it could lose its constitutionalism and become purely authoritarian.²²⁸ (a) In addition to the dynamic process described earlier in Part ---, the first path might involve something like learning: Toleration of some dissent increases so that more dissent emerges and the mechanisms of cooptation expand to encompass more people but weaken the commitment the coopted have to the regime’s authoritarianism. At some point members of the regime itself see little personal threat in

²²⁵ William Case, “Manipulative Skills: How Do Rulers Control the Electoral Arena?”, in Schedler, *supra* note ---.

²²⁶ Singapore’s system for compensating high civil servants is another example of design skill (coupled with the nation’s economic success). High civil servants receive salaries “pegged to economic performance and the salaries of the top echelons of a group of key professional classes.” Sree Kumar & Sharon Siddique, *The Singapore Success Story: Public-Private Alliance for Investment Attraction, Innovation and Export Development* (New York: United Nations, 2010), p. 15.

²²⁷ For a discussion of this possibility, see He & Warren, *supra* note ---. Levitsky & Way, *supra* note ---, argue that competitive authoritarian nations with strong links to the West – a description that fits Singapore – are more likely than other such regimes to democratize.

²²⁸ *Cf.* Levitsky & Way, *supra* note ---, at 25-26 (describing the possibility that competitive authoritarianism will become stable authoritarianism).

abandoning the regime's authoritarian characteristics at least in part because the emerging leaders of the nascent fully constitutionalist regime understand that providing such assurances is essential to the transition after which they hope to be the new regime's leaders.²²⁹

(b) The transformation to authoritarianism (or mere rule-of-law constitutionalism) might itself have several variants. For example, (i) the regime's leaders might be unable to transmit a normative commitment to consultation and responsiveness to their successors.²³⁰ The successors become increasingly less responsive and deal with increasing dissatisfaction through repression and violence. Or, (ii) the regime's leaders face increasing public dissatisfaction but cannot obtain

²²⁹ I include the regime members' inheritable wealth within the items they might be concerned about. So, they do not anticipate confiscation of that wealth either directly or when passed on to their heirs.

²³⁰ One question about the Singaporean example is the extent to which it is parasitic on the special intellectual and charismatic characteristics of Lee Kuan Yew, the nation's leader since independence (a leadership that was formal for many years and now is informal, with Lee Kuan Yew serving until 2011 in the nonstatutory post of Minister Mentor). Notably, the current Prime Minister is Lee Kuan Yew's son. Put in more general terms, Lee Kuan Yew's overwhelming role has meant that the PAP has not had to face severe problems of leadership succession and the possibility of intra-elite competition for leadership.

assurances that they would not suffer severe losses were they to leave office. To avoid those losses, they repress dissent.²³¹

The literature on what political scientists call electoral or competitive authoritarian regimes suggests one important constraint on the unraveling of constitutions in authoritarian regimes, and provides a way to conclude the discussion of the possibility of a relatively stable authoritarian constitutionalism. Andreas Schedler defines electoral authoritarianism: “[E]lections are broadly inclusive ... as well as minimally pluralistic ..., minimally competitive ..., and minimally open.”²³² For Beatriz Magaloni, “hegemonic-party systems allow opposition parties to challenge the incumbent party through multiparty elections.”²³³ Electoral authoritarian or hegemonic-party regimes are assured of victory in these elections. But, Magaloni emphasizes, not just victory – the dominant party in a dominant-party regime is assured of victory – but landslide yet minimally manipulated victories: “[H]egemonic-party systems are far more overpowering than predominant-party systems, usually controlling more than 65 percent of the legislative seats – so that they can *change the constitution unilaterally*, without the need for forge

²³¹ Again, I put to one side other origins of a transformation into authoritarianism such as defeat in a foreign adventure or severe economic stress, whether caused by regime missteps or exogenously.

²³² Schedler, *supra* note ---, at 382.

²³³ MAGALONI, *supra* note ---, at 32.

coalitions with opposition parties. This implies that there is no binding set of constitutional rules....”²³⁴

The risk of unraveling occurs precisely because there is no such set. And yet, the existence of more-or-less real elections indicates that these regimes are not fully authoritarian. Again, political scientists can offer instrumental accounts for conducting elections, but such accounts have the same vulnerabilities as instrumental accounts of other neutral institutions. So, for example, Magaloni identifies these functions: Elections “are designed to establish a regularized method to share power among ruling party politicians[,] ... to disseminate public information about the regime’s strength that would serve to discourage potential divisions within the ruling party[,] ... to provide information about supporters and opponents of the regime[,] ... [and] to trap the opposition, so that it invests in the existing autocratic institutions rather than challenging them by violent means.”²³⁵ As I have argued, these functions could be served by other institutional mechanisms, as for example occurs in the authoritarian People’s Republic of China. With autocratic control, more-or-less real elections will occur when, but only when, they produce the kinds of massive victories that give the regime control over the processes for modifying the constitution.

The main contribution of the scholarly literature on competitive or electoral authoritarianism to an inquiry into authoritarian constitutionalism is its focus on elections that are open, competitive, and pluralistic, though minimally so, according to Schedler. They must be

²³⁴ *Id.* at 35. *See also id.* at 259-61 (describing how hegemonic-party control in Mexico produced “the [e]ndogeneity of the Constitution”).

²³⁵ *Id.* at 9-10.

only minimally so lest the authoritarian regime become simply a liberal democracy with a dominant party. All the accounts make electoral manipulation a feature of these regimes. Yet, as Schedler and Magaloni note, while it is easy to distinguish “mere” manipulation from gross fraud and intimidation, it is much more difficult to distinguish it from the ordinary practices of politicians in liberal democracies.²³⁶ Schedler enumerates “the enactment of discriminatory election laws, the repression of protest marches, [and] the exclusion of candidates from the ballot by administrative fiat” as mechanisms to ensure massive victories. But, he continues, because “people may differ in their concrete definitions of democratic minimum standards, ... the frontier between electoral democracy and electoral authoritarianism represents essentially contested terrain.”²³⁷ Similarly, Magaloni observes that “the ruling party can commit electoral fraud or threaten to repress its opponents,” but criticizes Schedler for treating as “manipulations” behavior that “can also take place in systems that we normally regard as democratic,” such as “self-serving rules of representation granting them a decisive edge when votes are translated into seats.”²³⁸

Return now to Singapore for some examples. (1) *Manipulation affecting opposition candidates*. As noted earlier, Singapore’s Constitution bars from the Parliament anyone who “is

²³⁶ A good account of electoral manipulations in the United States is Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

²³⁷ Schedler, *supra* note ---, at 385.

²³⁸ MAGALONI, *supra* note ---, at 19, 33-34 (quoting Schedler, *Elections Without Victory: The Menu of Manipulation*, 13 J. DEMOCRACY 36, 45 (2002)).

an undischarged bankrupt.”²³⁹ The PAP intimidates the opposition not by arresting opponents for political offenses or on fake charges, but by suing them for libel. Using what Levitsky and Way describe in a different context as “colonial-era” libel laws,²⁴⁰ the PAP’s leaders obtained substantial judgments based on publications fairly treated under the libel laws as libelous statements about the crass motivations of politicians promoting the PAP’s policies. Notably, J.B. Jeyaretnam, a prominent opposition leader, twice lost his seat in Parliament, once after being convicted of a financial offense in connection with his party’s funds and once for failing to pay damages to PAP leaders for libeling them.²⁴¹ The libel laws Singapore’s leaders use to intimidate the opposition are indeed old-fashioned, and almost certainly not in tune with standards that prevail even outside the United States with its especially severe restrictions on libel law as applied to public figures. Yet certainly taken on their own, and probably even in connection with Singapore’s wider system of regulating expression, Singapore’s libel laws seem within the bounds of liberal constitutionalism – as might be suggested by the fact that other common-law

²³⁹ Constitution of Singapore, art. 45 (1)(b).

²⁴⁰ Levitsky & Way, *supra* note ---, at 58 (referring to the use of similar laws by Jerry Rawlings in Ghana). *See also* Levitsky & Way, *supra* note ---, at 9 (describing “the widespread ... use of libel or defamation laws against journalists, editors, and media outlets.”).

²⁴¹ Seth Mydans, “J.B. Jeyaretnam, Persistent Opposition Figure in Singapore, Is Dead at 82,” *New York Times*, Oct. 3, 2008. CHRIS LYDGATE, *LEE’S LAW: HOW SINGAPORE CRUSHES DISSENT* (2003), is an admiring biography of Jeyaretnam.

nations used quite similar rules until relatively recently and were at those times rather clearly liberal constitutional states anyway.²⁴²

(2) “*Gerrymandering*.” Manipulation of constituency boundaries – classical gerrymandering – is of course possible in liberal democracies as well as in other regimes.²⁴³ A related example of electoral manipulation well short of fraud is Singapore’s GRCs.²⁴⁴ Whatever their possible good-government rationales, the GRCs serve to impede opposition electoral success. A charismatic or otherwise extremely popular opposition candidate might win in a single-member district, but might find it more difficult to carry the whole list to victory in a GRC: One charismatic candidate and two dull ones might lose to a PAP slate of three solid but unexciting candidates.²⁴⁵ The GRCs appear to explain the dramatic translation of substantial but

²⁴² For another example, see Anil Kalhan, “*Gray Zone*” *Constitutionalism and the Dilemma of Judicial Independence in Pakistan*, 46 VAND. J. TRANSN'L L. ---, --- (2013) (describing the creation of a requirement that members of Parliament hold college degrees).

²⁴³ See ANDREW HARDING, *THE CONSTITUTIONAL OF MALAYSIA: A CONTEXTUAL ANALYSIS* 91 (2012) (describing classical gerrymandering in Malaysia).

²⁴⁴ See Thio, *supra* note ---, at 47 (referring to the GRC system as “gerrymandering”).

²⁴⁵ The GRCs also help the PAP in recruiting candidates who might be reluctant to put themselves forward without assurances of success. Those assurances can be provided by putting the candidate on a slate headed by a popular minister. See Li-Ann Thio, “In Search of the Singapore Constitution: Retrospect and Prospect, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* 323, 328-29 (Li-Ann Thio & Kevin Y.L. Tan eds., 2009).

not overwhelming victories in the popular vote into overwhelming predominance in the legislature.²⁴⁶

(3) “*Pork barrel*” spending. Finally, William Case argues that the leaders of the Malaysian electorally authoritarian regime engage in vote-buying by providing supporters with valuable benefits such as “on-the-spot ‘development grants’ for new clinics, paved roads, or mosques.”²⁴⁷ Similarly, “Singapore’s government has threatened to cut off state funding for public housing upgrades in those districts where opposition candidates win.”²⁴⁸ Magaloni puts

²⁴⁶ See also HARDING, *supra* note ---, at 86 (noting the electoral distortion in Malaysia, where a majority of 50.27% translated into 140 legislative seats, 46.75% into 82 seats). The limited period in which formal campaigning for office is allowed – nine days – should also be mentioned here, as a design feature that limits the opposition’s opportunity for publicizing its position. See SEOW, *supra* note ---, at 36 (making this point). In the United States, the franking privilege available to sitting members of Congress provides them with a similar structural advantage in disseminating their positions, at least in connection with constituent services.

²⁴⁷ Case, *supra* note ---, at 103. See also HARDING, *supra* note --- at 143-44 (describing the national government’s cancellation of oil and gas royalties scheduled to be paid to a state governed by the opposition party).

²⁴⁸ *Id.* at 104. See also Thio, *supra* note ---, at 30-31 (describing a speech made by Prime Minister Goh in 2001 stating that precincts that cast more than 50% of the vote for the PAP “would enjoy priority in upgrading programmes.”). Note that Case and Goh (quoted by Thio) refer to denying upgrades, not withdrawal of existing subsidies. See also HARDING, *supra* note --, at 92 (noting “threats of economic sanctions for areas returning opposition candidates”).

the point more generally: “[T]he ruling party monopolizes the state’s resources and employs them to reward voter loyalty and to punish voter defection.”²⁴⁹ From another perspective, though, these are examples of ordinary pork-barrel politics or credit-claiming by elected politicians in liberal democracies.²⁵⁰

²⁴⁹ MAGALONI, *supra* note ---, at 19. *See also* DODSON, *supra* note ---, at 123, 126 (describing forms of withdrawing public resources from opposition-led areas in Venezuela).

²⁵⁰ With respect to Singapore, after the United States Department of State expressed concern over Lee’s statement that “constituencies that elect opposition candidates will receive low priority in extensive government plans to upgrade public housing facilities,” a major figure in the PAP “professed surprise that the Americans ‘should raise an issue about how we run democratic politics in Singapore when their pork-barrel politics is something of a long tradition.” FANCIS T. SEOW, *BEYOND SUSPICION? THE SINGAPORE JUDICIARY* 29-40 (2006). *Cf.* Fernanda Brollo & Tommaso Nannicini, *Tying Your Enemy’s Hands in Close Races: The Politics of Federal Transfers in Brazil*, 106 AM. POL. SCI. REV. 742 (2012) (finding that the national government “punishes” municipalities led by mayors from opposition parties by giving them smaller discretionary transfers than are given to municipalities led by mayors from the governing coalition). The standard citation for credit-claiming is DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). *See also* James A. Robinson & Ragnar Torvik, *White Elephants*, 89 J. PUB. ECON. 197 (2004) (providing a formal model of inefficient pork barrel spending as a technique used to provide credible commitments to constituents, thereby giving them a reason to vote for the incumbent party).

These examples illustrate the difficulty in distinguishing electoral manipulations in hybrid regimes from ordinary politics in liberal constitutional ones.²⁵¹ After several pages seeking to distinguish competitive authoritarianism from pure authoritarianism and democracy, Levitsky and Way find themselves offering a summary of the “level of uncertainty” associated with competitive authoritarian elections: The level is “[l]ower than democracy but higher than full authoritarianism.”²⁵² At some point, of course, matters of degree become matters of kind, and the cumulative and perhaps interactive effects of several types of manipulation might exceed even a rather extensive exercise of an individual type in a liberal democratic regime. But, perhaps we should consider some hybrid regimes as falling within the domain of normative constitutionalism.

²⁵¹ I note my sense that some of the work on hybrid regimes trades on failing to distinguish sharply enough between electoral fraud and electoral manipulation, evoking images of fraud to motivate analyses that describe systems that are of particular interest because only manipulation occurs. For examples, see MAGALONI, *supra* note ---, at 18 (“A third instrument hegemonic parties employ to deter party splits is raising the costs of entry to potential challengers by ... threatening to commit electoral fraud against them and to use the army to enforce such fraud.”); Levitsky & Way, *supra* note ---, at 52-53 (“Incumbents violate ... rules so often and to such an extent ... that the regime fails to meet conventional minimum standards for democracy.... Members of the opposition may be jailed, exiled, or --- less frequently – even assaulted or murdered.”). In contrast, see MAGALONI, *supra*, at 21 (Figure 1.1, identifying a category in which there is “[n]o need for electoral fraud”).

²⁵² Levitsky & Way, *supra* note ---, at 13.

VI. Conclusion

Singapore is not a bad place to live even for dissidents from the regime. They might suffer relatively low levels of government harassment, be deprived of access to some significant government benefits, and the like, but few are hounded into exile or and even fewer thrown arbitrarily in jail. Yet, of course, it is not a liberal democracy. From a normative point of view the central question, probably unanswerable now, is whether a Singapore without authoritarian constitutionalism would be a liberal democracy or a fully authoritarian state. If the latter, authoritarian constitutionalism may be normatively attractive *for Singapore*.

There may well be additional forms of normatively constitutionalist systems that are not fully constitutionalist.²⁵³ I hope that these observations will contribute to a more sustained consideration both of additional conceptual possibilities and, in my view more important, of cases in which we can observe something other than authoritarianism and full normative constitutionalism. I believe that there are such cases, and that examining them would shed light

²⁵³ To adapt a well-known line concluding another, far more important paper, it has not escaped my notice that the argument developed here might support the proposition that the United States does not have a fully constitutionalist system. *Cf.* CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 356 (1977) ("The large public corporation fits oddly into democratic theory and vision. Indeed, it does not fit.").

not only on questions of institutional design within a normatively constitutionalist framework but on normative constitutionalism itself.²⁵⁴

²⁵⁴ One promising candidate for examination in the service of pluralizing the idea of constitutionalism are the post-Communist nations of central and eastern Europe. They are often described as “transitional,” yet, as the political science literature suggests, *supra* note ---, that term might be inapt in light of the persistence of the “transiton.” Seeing these nations as exemplifying a distinctive form of constitutionalism, we might be able to develop some analytic purchase on their characteristics. For example, Wojciech Sadurski’s study suggests that constitutional courts in the post-communist nations have done a better job in adjudicating individual rights claims than in dealing with issues of separation of powers. WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (2005). Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 45 L. & SOCIETY REV. 117 (2001), offers an analytic framework that might begin to account for this pattern.